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§1.00. Involuntariness and coercion

United States Supreme Court Petitioner, a mentally deficient escapee from a state prison, was properly in police custody. However, his confession, elicited after 16 days of sporadic, incommunicado interrogation was involuntary under pre-*Miranda* standards. Davis v. North Carolina, 384 U.S. 907, 2 CLB No. 6, p. 23.

United States Supreme Court Incriminating statements given by police officers under threat of discharge for failure to answer are involuntary and may not be used against them in a subsequent criminal prosecution. Garrity v. New Jersey, 385 U.S. 493, 3 CLB 30.

Court of Appeals, District of Columbia Defendant's confession made at gunpoint at the time of arrest held not involuntary as a matter of law. Pyles v. United States, 362 F.2d 959, 2 CLB No. 6, p. 36.

Alabama Where defendant confessed after being permitted to telephone and speak with counsel, his confession was admissible in the absence of evidence of coercion. Tiner v. State, 182 So.2d 859, 2 CLB No. 4, p. 45.

Arizona Admissions made by a "strung out" drug addict are properly found voluntary in the absence of coercive tactics, such as promises to give him drugs if he confesses. State v. McFall, 428 P.2d 1013, 3 CLB 499.

Hawaii Defendant's pre-*Miranda* confession is found to be involuntary where (1) psychiatrists found him "psychotic" at dates one month before and eight months after the confession, (2) defendant was not first warned of his constitutional rights, and (3) defendant's appointed attorney was not informed of the interrogation. State v. Wong, 430 P.2d 330, 3 CLB 574.

New Jersey Court reversed murder conviction where uncontradicted testimony established that: accused's confession was given after police forced him to view the body of deceased; accused's bruises were unexplained; accused was of dull mentality; and there was an error in the statement itself. State v. Cook, 221 A.2d 212, 2 CLB No. 8, p. 44.

New York Fact that police obtained confession by falsely stating to suspect that she might as well confess because the victim (already deceased) would identify her anyway held not to render confession inadmissible.

Absent evidence of coercion, the fact that suspect had been drinking before giving statement was not in itself evidence of involuntariness. People v. McQueen, 18 N.Y.2d 337, 2 CLB No. 9, p. 44.

New York Necessary force used to arrest murder suspect does not render subsequent admission involuntary. People v. Hill et al., 17 N.Y.2d 185, 2 CLB No. 4, p. 46.

New York Supreme Court Hospital confession given by defendant who was in critical condition and who, the day before, had been shot twice in the back, had lost eight pints of blood, had undergone a four hour operation, and had been given demerol, thorazine, and atrophine held involuntary as a matter of law. People v. D'Iorio, 266 N.Y.S.2d 664, 2 CLB No. 3, p. 59.

Tennessee Defendant's confession was held voluntary where given after defendant voluntarily came to police station and police told him that they didn't need a statement from him as they already had enough to send him to electric chair. Wheeler v. State, 415 S.W.2d 121, 3 CLB 500.

Texas Where the defendant signed only his Christian name to his confession the court held that the statute requiring a confession to be signed had been complied with. Delespine v. State, 396 S.W.2d 133, 2 CLB No. 1, p. 51.

§1.10. Delay in arraignment

Court of Appeals, 2nd Cir. Defendant's pre-arraignment statements excluded by trial judge from government's direct case because obtained during an unnecessary delay in arraignment and in violation of defendant's right to counsel may still be used to impeach defendant's credibility on collateral matters. United States v.

Curry, 358 F.2d 904, 2 CLB No. 1, p. 35.

Court of Appeals, 8th Cir. Indian defendant serving prison sentence under minor Tribal Code violation could not claim that his murder confession was taken in violation of McNabb-Mallory rule, since he was in legal custody. Wakaksan, Jr. v. United States, 367 F.2d 639, 2 CLB No. 10, p. 34.

Wisconsin Wisconsin Supreme Court holds *Escobedo* not retroactive. (Defendant had requested counsel and counsel had been denied admittance to defendant.)

Court also holds that detaining defendant without arraignment for longer than is reasonably necessary to determine whether to release prisoner or make formal complaint violates due process and renders any confession inadmissible. But holding is not retroactive. State ex rel. Van Erman v. Burke, 140 N.W.2d 737, 2 CLB No. 5, p. 50.

§1.20. Absence of counsel

New York Appellate Division Where defendant was arrested on charge of burglary committed in officer's presence and immediately requested counsel, the fact that the subsequent interrogation and admission concerned an unrelated robbery was irrelevant. The request for counsel did not have to be renewed. That arresting officer did not inform interrogating detective of defendant's request was irrelevant. People v. Dunleavy, 26 A.D.2d 649, 2 CLB No. 9, p. 56.

Florida Confession taken in interval between the time the defendant has contacted his counsel and counsel's arrival is admissible. Male v. State, 189 So.2d 521, 2 CLB No. 9, p. 57.

§1.25. Failure to warn (Pre-Miranda)

Court of Appeals, 7th Cir. Defendant committed to jail because he is unable to post bond, is not entitled to warning by prison medical authorities prior to taking of his medical history. U.S. v. Oliver, 363 F.2d 15, 2 CLB No. 8, p. 30.

Washington Defendant's statements in his own home prior to any arrest held to be admissible, despite the fact that he was neither advised of his right to counsel nor of his right to remain silent. State v. Baker, 413 P.2d 965, 2 CLB No. 6, p. 54.

§1.30. Product of an illegal arrest or search

Court of Appeals, 5th Cir. Confession given by defendant following his illegal arrest held not excludible as the fruits of the poisonous tree where arrest was noncoercive and was unaccompanied by interrogation, and where subsequent to arrest and prior to giving statement, defendant was fully advised as to his rights at arraignment before U.S. Commissioner and was released on a personal recognizance bond. Any taint arising from the illegal arrest had dissipated before the confession was given. Thomas v. United States, 376 F.2d 564, 3 CLB 325.

Pennsylvania Defendant's illegal arrest does not render his subsequent confession *per se* inadmissible. Commonwealth v. Bishop, 228 A.2d 661, 3 CLB 343.

§1.40. Escobedo v. Illinois

Court of Appeals, 3rd Cir. Incriminating statement held excludible under *Escobedo* even though officers did not deny suspect's request to consult with counsel. Aquino v. United States, 383 F.2d 734, 3 CLB 335.

Arizona Custodial interrogation without informing defendant of right to be silent is by itself a violation of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), as explained in *Miranda* v. *Arizona*, 384 U.S. 436, 465 (1966). State v. Anderson, 428 P.2d 672, 3 CLB 498.

California Accusatory stage cannot be reached until defendant is taken into custody or indicted. Ballard v. Superior Court, 410 P.2d 838, 2 CLB No. 4, p. 57.

California New trial is ordered under *Escobedo* when *habeas corpus* petitioner's confession was given after six days in custody and testimony conflicted about whether he was warned of his constitu-

tional rights. In re Shipp, 427 P.2d 761, 3 CLB 498.

California ". . . [A]lthough an arrest ordinarily signals the advent of the accusatory stage, the fact of an arrest is not essential to the maturing of that stage. Rather, in determining whether such stage has been reached, all of the circumstances must be considered, including such factors as the evidence of guilt in the possession of the police, the pressures short of arrest which the police exert to detain the suspect and other factors which may subject the suspect to unusual pressures." People v. Furnish, 407 P.2d 299, 2 CLB No. 1, p. 50.

Iowa Supreme Court of Iowa holds that a request for counsel is not necessary under *Escobedo* and that *pre-Miranda, post-Escobedo* admissions made without proper advice as to rights to silence and counsel, after accusatory stage had been reached, are inadmissible. State v. Rye, 145 N.W.2d 608, 3 CLB 63.

Oklahoma Prisoner's admission made to warden that he had stabbed other prisoner held admissible. *Escobedo* v. *Illinois* inapplicable. Carico v. State, 418 P.2d 702, 2 CLB No. 10, p. 58.

Pennsylvania Where trial occurred after decision in *Escobedo* v. *Illinois*, 378 U.S. 478, the trial court erred in permitting incriminating statement in evidence where accused had merely been advised that he did not have to say anything if he didn't want to. Accused should have been advised that statements could be used against him. Commonwealth v. Medina, 227 A.2d 842, 3 CLB 343.

§1.50. Intoxication

Colorado That accused person is intoxicated when he makes incriminating statements does not automatically render such statements inadmissible. Ballay v. People, 419 P.2d 446, 3 CLB 48.

North Carolina "Unless a defendant's intoxication amounts to a mania – that is, unless he is so drunk as to be unconscious of the meaning of his words – his intoxication does not render inadmissible his confession of facts tending to incriminate him. The extent of his intoxication when the confession was made, however, is a relevant circumstance bearing upon its credibility, a question exclusively for the jury's determination." State v. Logner, 145 S.E.2d 867, 2 CLB No. 3, p. 59.

§1.60. Post-Indictment and Post-Arrest

Court of Appeals, 2nd Cir. Post-indictment statement made by defendant to undercover agent held not inadmissible under *Massiah* where agent had no knowledge that defendant was under indictment. United States v. Garcia, 377 F.2d 321, 3 CLB 308, 337.

Court of Appeals, 2nd Cir. Post-indictment incriminating statements freely made by defendant in the absence of counsel to a cell mate who was not a government agent are admissible. *Massiah* v. *United States*, 377 U.S. 201, only requires the exclusion of post-indictment statements given in the absence of counsel where the statement was made to a government agent and the defendant was "subjected to interrogation." Paroutian v. United States, 370 F.2d 631, 3 CLB 39.

California Post-indictment incriminating statements made to undercover officer, posing as prisoner, held inadmissible under authority of Massiah v. U.S., 377 U.S. 201. Conviction reversed despite fact that defendant denied making the statements. People v. Arguello, 407 P.2d 661, 2 CLB No. 1, p. 59.

California Where the defendant was implicated in a burglary and two days later voluntarily came to the police station with the stolen goods, subsequent interrogation by the sheriff violated defendant's right to counsel. People v. Chaney, 409 P.2d 964, 2 CLB No. 2, p. 55.

Florida The use at trial of incriminating statements discovered by the jailer through the censorship of defendant's mail is not an invasion of his constitutional rights. Baker v. State, 202 So.2d 563, 3 CLB 660.

Illinois Post-indictment statements made

in absence of counsel and without a waiver of counsel held inadmissible at trial. People v. Halstrom, 213 N.E.2d 498, 2 CLB No. 3, p. 64.

New Jersey Voluntary, post-indictment statement elicited in the absence of counsel is inadmissible in evidence. State v. Green, 215 A.2d 546, 2 CLB No. 1, p. 62.

New York Appellate Division Incriminating statement made by accused in the absence of counsel as he was being placed in courthouse detention cell immediately prior to arraignment held inadmissible because the judicial process had, in effect, begun. People v. Richardson, 25 A.D.2d 221, 2 CLB No. 5, pp. 16, 29.

§2.00. Prerequisite of custodial interrogation

Court of Appeals, 1st Cir. An Internal Revenue agent is not required, under *Miranda* v. *Arizona*, 384 U.S. 436, to warn an individual of his right to counsel when he comes, upon request, to the office of the Internal Revenue Service to discuss his income tax returns. Morgan v. United States, 377 F.2d 507, 3 CLB 325.

California Where defendant was in custody as a suspect in an unrelated crime, his confession to the crimes of robbery and murder without advice as to his constitutional rights, was inadmissible. People v. Marbury, 407 P.2d 667, 2 CLB No. 1, p. 59.

Maryland Defendant's admission made on public street after an arrest for a traffic infraction in response to arresting officer's question "You have cigarettes on that truck, don't you?" held admissible, despite officer's failure to give *Miranda* warnings, on ground that the defendant had not been subjected to custodial interrogation. Gaudio v. State, 230 A.2d 700, 3 CLB 573.

New York Appellate Division Where defendant's statements were elicited after arrest and after he was "booked" on the police blotter, they should not have been received in evidence regardless of their voluntary nature. People v. Veitch, 26 A.D.2d 764, 2 CLB No. 9, p. 43.

Oregon The police may interrogate a criminal suspect without first warning him of his constitutional right where he has not as yet been taken into police custody. State v. Evans, 407 P.2d 621, 2 CLB No. 1, p. 51.

§2.10. Sufficiency of warnings

Court of Appeals, 10th Cir. FBI agent's advice to defendant that he "can talk to a lawyer or anyone before saying anything and that the judge will get [him] a lawyer if [he is] broke" satisfies right to counsel element of *Miranda* warning. Coyote v. United States, 380 F.2d 305, 3 CLB 489.

Delaware Inadequate warnings given to defendant prior to signing written confession does not make the confession inadmissible where the defendant was correctly advised before making the oral confession on which the written confession was based. Brooks v. State, 229 A.2d 833, 3 CLB 497.

Georgia Georgia Court of Appeals rules that it is harmless error for police officer to fail to give the warning required by *Miranda* v. *Arizona*, 384 U.S. 436, that if the defendant were indigent, a lawyer would be appointed to represent her. The court found that the officer gave the first three warnings required by *Miranda*, and that since there was nothing in the record to indicate indigency (the defendant had been represented by retained counsel both at the trial and upon appeal), the officer's failure to give the fourth warning was not prejudicial. O'Neil v. State, 153 S.E.2d 663, 3 CLB 342.

North Carolina Supreme Court of North Carolina holds that where a suspect is given three of the four warnings required by *Miranda*, but no advice is given that if he is an indigent the court will appoint counsel for him, his confession is nonetheless admissible where there is no evidence to establish that he was indigent in fact. State v. Gray, 150 S.E.2d 11, 2 CLB No. 10, p. 60.

§2.20. Waiver

Missouri Statement by defendant that "she did not mind making a statement"

held to be a waiver of right to counsel, where police advised her at the outset of her right to counsel, right to remain silent, and the fact that her statement could be used against her in court of law. Thompson v. Mississippi, 186 So.2d 747, 2 CLB No. 7, p. 50.

Nevada Where defendant was once properly advised of his rights to remain silent and to have an attorney, there was no requirement that he be warned a second time when he voluntarily confessed after first refusing to make a statement. Troiani v. State, 418 P.2d 815, 2 CLB No. 10, p. 50.

Ohio On-duty police officer's statement, to other officers summoned by him, that he shot decedent is admissible in manslaughter trial of officer even though made without warning of right to silence and to counsel. Voluntary unsolicited statements made by officer-defendant to coroner after arrest are also admissible without proof that *Miranda* warnings were given. State v. Hymore, 224 N.E.2d 126, 3 CLB 345.

§2.30. Volunteered and spontaneous statements

District of Columbia Police officer who while filling out arrest forms in police station overheard defendant's offer to repay money to complainant could testify to conversation; defendant had been informed of his rights and was not subjected to interrogation. Lawrence v. U.S., 224 A.2d 306, 3 CLB 53.

New Jersey When, in response to police officer's statement that the victim had just been found dead and the police officer understood that the defendant was a relative, defendant blurts out that he had an argument with the homicide victim after being struck on the head by the victim, this constituted a volunteered statement made before custody had attached and thus there was no requirement for the officer to give *Miranda* warning. State v. Rudd, 230 A.2d 129, 3 CLB 501.

§2.50. Statements to persons other than police

Court of Appeals, 9th Cir. Evidence illegally seized by Mexican officials and statements taken by these officials in Mexico during an unreasonable delay in arraignment are nevertheless admissible in Federal Court. The exclusionary rules are designed to deter federal officials from violating federal law and would have no effect upon Mexican officials. Brulay v. United States, 383 F.2d 345, 3 CLB 484.

Court of Appeals, 9th Cir. Ninth Circuit holds, in the exercise of its supervisory power, that reporters who conduct interviews with police suspects may not testify as government witnesses with respect to the subject matter of these interviews. Evalt v. United States, 359 F.2d 534, 2 CLB No. 4, p. 33.

§2.60. Applicability of Miranda to other proceedings

Florida Grand jury waiver executed by the petitioner without including those warnings mandated by *Miranda* v. *Arizona*, 384 U.S. 436, does not require a dismissal of the indictment for crimes being investigated by the Grand Jury. State ex rel. Lowe v. Nelson, 202 So.2d 232, 3 CLB 657.

Illinois A defendant against whom state seeks to proceed under Sexually Dangerous Persons Act is entitled to counsel and *Miranda* warnings prior to statutory psychiatric examination. People v. Potter, 228 N.E.2d 238, 3 CLB 571.

Maryland Defective delinquency adjudication based upon statements made by defendant at state mental institution held not invalid because defendant was not warned of his rights under *Miranda*. Wise v. Director, 230 A.2d 682, 3 CLB 572.

§3.00. Procedure for determining admissibility

United States Supreme Court Holding *Jackson* v. *Denno* voluntariness hearing in the presence of jury does not, by itself, violate defendant's constitutional rights. Pinto v. Pierce, 389 U.S. 31, 3 CLB 634.

California I. At a post-*Escobedo* retrial on the question of penalty, where the only evidence consists of transcripts of the pre-

Escobedo guilt and penalty trials, court must delete not only all references to admissions taken in violation of *Escobedo*, but also all of defendant's testimony.

II. *Escobedo* is not made applicable to a pre-*Escobedo* guilt trial by the subsequent ordering of a new trial on the issue of penalty alone. People v. Jackson, 429 P.2d 600, 3 CLB 578.

Illinois Defendant is entitled to hearing as to the voluntariness of his alleged confession even though he denied having made it. See *Lee* v. *State of Mississippi*, 332 U.S. 742. People v. Cook, 211 N.E.2d 374, 2 CLB No. 1, p. 51.

Iowa Supreme Court of Iowa adopts "orthodox" procedure for determining admissibility of confession. Trial court's determination as to voluntariness is binding. Evidence concerning voluntariness may be considered by jury only in assessing weight to be given to the confession. State v. Holland, 138 N.W.2d 86, 2 CLB No. 1, p. 51.

New Jersey Motion to suppress confession as fruit of a search declared illegal by court 10 months previously should not be brought under statute providing for suppression of tangible property. Order granting suppression of confession was improvidently entered. Court expresses doubt that there is authority for a pretrial attack on the admissibility of a confession under New Jersey motion practice, and accordingly rules that proper time for such an attack is at the time of trial. State v. Ferrara, 231 A.2d 224, 3 CLB 573-574.

New Jersey Holding voluntariness hearing in the presence of the jury does not violate any of the defendant's constitutional rights. State v. Broxton, 230 A.23 489, 3 CLB 574.

New York Court's refusal in retroactive confession hearing to permit proof of police failure to warn suspect of constitutional rights was error. Error was harmless, however, where transcript of trial containing proof of such failure was already in evidence. People v. Horton and Alvarez, 18 N.Y.2d 355, 2 CLB No. 10, p. 50.

New York Appellate Division Trial judge's comment after hearing on issue of voluntariness of confession that he had found confession voluntary but that jury could disregard his finding held reversible error. People v. Stewart, 266 N.Y.S.2d 538, 2 CLB No. 3, p. 56.

New York Appellate Division Where in non-jury youthful offender proceeding, the prosecutor was permitted to cross-examine defendant at preliminary confession hearing on question of guilt or innocence, the defendant's adjudication as a youthful offender was reversed. Fact that the defendant took the stand in his own behalf at trial was irrelevant. People v. Sayers and Trevail, 26 A.D.2d 736, 2 CLB No. 9, p. 43.

New York Appellate Division Where defendant made three separate statements, each of which was received in evidence at trial but only two of which were passed upon and held voluntary at a pre-trial hearing, the matter was remanded to the trial court to determine the voluntariness of the third statement. People v. Colavecchio, 270 N.Y.S.2d 101, 2 CLB No. 6, p. 47.

New York Appellate Division Defendant who takes the stand at pretrial confession hearing and testifies only with respect to the facts surrounding the taking of the confession may not be cross-examined upon the merits. People v. Lacy, 25 A.D. 2d 788, 2 CLB No. 6, p. 54.

New York Appellate Division Appellate Division criticizes failure of trial court to charge jury with respect to the voluntariness of defendant's admission. But court nevertheless affirms conviction in light of sufficient evidence apart from admission to sustain findings of guilt. People v. Baksys, 26 A.D.2d 648, 2 CLB No. 9, p. 41.

North Carolina It is reversible error for a judge to have the jury present at the time he makes his preliminary finding as to the voluntariness of the defendant's confession. "Admissibility is for determination by the judge unassisted by the jury.

Credibility and weight are for determination by the jury unassisted by the judge." The judge's statement of opinion as to the element of voluntariness was an invasion of the province of the jury. State v. Walker, 145 S.E.2d 833, 2 CLB No. 3, p. 56.

North Carolina Trial court's statement, reproduced below, after hearing testimony concerning the voluntariness of defendant's confession, held insufficient as finding of fact to permit appellate review. New trial ordered.

> "Let the records show that the Court finds the statement and admissions to Officer Munn and Officer Watkins were made freely and voluntarily by the defendant without reward or hope of reward, or inducement, or any coercion from said officers."

State v. Conyers, 148 S.E.2d 569, 2 CLB No. 7, p. 43.

Wisconsin Wisconsin Supreme Court holds that unless prejudice toward defendant can clearly be shown, original trial judge is proper party to hold hearing under Jackson v. Denno, 378 U.S. 368 (1964), on question of voluntariness of confession after remand from appellate court. State v. Carter, 146 N.W.2d 466, 3 CLB No. 1, p. 48.

§3.10. Standing

California Defendant has no standing to object to use of evidence discovered as a result of statements of his co-defendant and the co-defendant's wife taken in violation of *Escobedo*. People v. Varnum, 427 P.2d 772, 3 CLB 498-499.

Georgia Defendant cannot complain of a violation of co-defendants' privilege against self-incrimination. Johnson v. State, 145 S.E.2d 636, 2 CLB No. 2, p. 54.

§3.20. Burden of proof

Illinois Where the defendant testified to facts which, if true, would render his confession involuntary and therefore inadmissible and the officers' rebuttal testimony "reveals nothing more than that they were not aware of any possible abuses to which defendant had been subjected prior to signing the confession," the confession should have been deemed involuntary and excluded. (See, *People* v. *Jones*, 402 Ill. 231, 83 N.E.2d 579.) People v. Williams, 211 N.E.2d 751, 2 CLB No. 1, p. 51.

Illinois Where defendant has unexplained physical injuries after detention by police, state has burden of proving those injuries were not the product of physical coercion before confession can be admitted. People v. Davis, 220 N.E.2d 222, 2 CLB No. 10, p. 49.

§3.30. Right to a hearing

Court of Appeals, District of Columbia Defendant is not entitled to a hearing on the voluntariness of his confession where he neither objects nor asks for a hearing. Woody v. United States, 379 F.2d 130, 3 CLB 325.

§4.00. Miranda

Alabama Alabama Supreme Court rules that *Miranda* v. *Arizona*, 384 U.S. 436, and *Griffin* v. *California*, 380 U.S. 609 (comment on defendant's failure to testify held unconstitutional) apply only to trials which commenced after the dates of those respective decisions. Philipot v. State, 190 S.2d 291, 2 CLB No. 10, p. 58.

Delaware Supreme Court of Delaware rules that upon a retrial of an indictment initially tried six months before the date of *Miranda* v. *Arizona*, 384 U.S. 436, the lower court should not apply the standards announced in *Miranda;* also announces new rule in respect to its felony second degree murder. Jenkins v. State, 230 A.2d 262, 3 CLB 501.

Illinois Supreme Court of Illinois holds *Miranda* inapplicable to retrials where the original trials took place before June 13, 1966. People v. Worley, 227 N.E.2d 746, 3 CLB 582.

Michigan *Miranda* v. *Arizona* not retroactive. People v. Fordyce, 144 N.W.2d 340, 2 CLB No. 9, p. 45.

Minnesota Supreme Court of Minnesota denies retrospective effect to confession rules announced in *Miranda* v. *Arizona*,

384 U.S. 436, State v. Winge, 144 N.W.2d 704, 2 CLB No. 9, p. 45.

Missouri Supreme Court of Missouri holds that as to defendants whose trials commenced subsequent to *Escobedo* but prior to June 13, 1966 (date of *Miranda* decision), the test of their voluntariness is the "totality of the circumstances" test. Missouri v. Beasley, 404 S.W.2d 689, 2 CLB No. 8, p. 53.

New York *Miranda* v. *Arizona* held not retroactive. People v. McQueen, 18 N.Y. 2d 337, 2 CLB No. 9, p. 44.

North Carolina Supreme Court of North Carolina rules that upon re-trial of a case originally heard several weeks before the effective date of *Miranda* v. *Arizona*, 384 U.S. 436, the re-trial will be governed by *Miranda*. State v. Jackson, 155 S.E.2d 236, 3 CLB 582.

§4.10. Escobedo

Minnesota Minnesota Supreme Court holds: I. *Escobedo* does not require retroactive application. II. *Escobedo* only applies where facts disclose affirmation denial of right to counsel by action of law enforcement authorities. III. *Jackson* v. *Denno*, 378 U.S. 368, is not to be applied retroactively. State ex rel. Rasmussen v. Tabash, 141 N.W.2d 3, 2 CLB No. 5, p. 47.

§4.20. Massiah

Court of Appeals, 1st Cir. *Massiah* v. *United States*, 377 U.S. 201 (1964) excluding post-indictment statements taken in the absence of counsel as a violation of the Sixth Amendment, applies to cases still in the direct appellate process at the time of the *Massiah* decision, May 18, 1964. Hancock v. White, 378 F.2d 479, 3 CLB 325.

Maryland *Massiah* v. *United States*, 377 U.S. 201, which held inadmissible post-indictment statements obtained in the absence of counsel, is not to be applied retroactively to cases in which the convictions became final prior to May 18, 1964, the date on which Massiah was decided. Elliot v. Warden, 22 A.2d 55, 2 CLB No. 9, p. 45.

§4.30. Jackson v. Denno

Alabama *Jackson* v. *Denno*, 378 U.S. 368, held inapplicable to trials occurring prior to that decision where the defendant failed to request a hearing on voluntariness outside the presence of the jury. Tiner v. State, 182 So.2d 859, 2 CLB No. 4, p. 46.

§5.10. Arraignment and preliminary hearing

Court of Appeals, 8th Cir. Preliminary hearing held critical stage in proceeding at which defendant was entitled to counsel where plea of guilty entered thereat could be used against him at subsequent trial. Sigler v. Bird, 354 F.2d 694, 2 CLB No. 1, p. 41.

Nebraska Where the defendant offered no testimony and made no admissions, the refusal of the trial court to assign counsel at the preliminary hearing was not a denial of procedural due process. State v. Sheldon, 138 N.W.2d 428, 2 CLB No. 1, p. 60.

§5.12. Guilty plea

New York Appellate Division Defect of no counsel at time of entry of guilty plea cured by subsequent representation by counsel at sentence. People v. Sinclair, 28 A.D.2d 183, 3 CLB 695, 707.

Wisconsin The trial court's failure to assign counsel prior to accepting a guilty plea was cured by assigned counsel's ratification of the plea at the time of sentence. Eskra v. State, 138 N.W.2d 173, 2 CLB No. 1, p. 59.

§5.30. Traffic and ordinance violations

Louisiana Right to counsel as guaranteed by United States Constitution and Louisiana Constitution is not applicable to prosecution for violating municipal ordinance. City of New Orleans v. Cook, 191 So.2d 634, 3 CLB 64.

New York There is neither a statutory nor a constitutional duty to inform a defendant of this right to counsel in traffic court. People v. Letterio, People v. Kohler, 16 N.Y.2d 307, 2 CLB No. 1, p. 60.

§5.35. Right to continuance of trial to obtain new counsel

Court of Appeals, 2nd Cir. One week's time was not a reasonable opportunity for a defendant in marginal financial circumstances to retain a new attorney of his own choosing. Defendant's former attorney having withdrawn after picking a jury, he was under no obligation to choose between assigned counsel and no counsel. U.S. ex rel. Davis v. McMann, 386 F.2d 611, 3 CLB 641.

Court of Appeals, 2nd Cir. Where defendant has discharged his original retained counsel on grounds of incompatibility, action of District Court judge in forcing him to trial in complicated selective service prosecution after allowing him only one week in which to retain new counsel, held an abuse of discretion and a violation of his Sixth Amendment rights. United States v. David Henry Mitchell III, 354 F.2d 767, 2 CLB No. 1, p. 40.

California Where defendant agreed to be represented by the public defender in his trial for larceny and the prosecutor thereafter added a robbery count arising out of the same facts, the trial judge abused his discretion in not granting the defendant's request for a continuance to give him an opportunity to retain private counsel. People v. Byoune, 420 P.2d 221, 3 CLB No. 1, p. 64.

Oklahoma Although appellate court finds that defendant was deprived of fundamental fairness when, after declining to accept an assigned attorney on the first day set for trial, he was denied an opportunity to retain an attorney and was put to trial without one, the court, nevertheless, does not reverse, but merely orders his sentence on the drunken driving conviction reduced from one year to sixty days. Rundles v. State, 428 P.2d 286, 3 CLB 509.

§5.40. Sentencing

New York Where record reflected that the defendant was merely attempting to forestall sentence by not appearing with counsel, the trial judge's action in sentencing him without counsel would not be overturned. People v. San Souci, 17 N.Y.2d 684, 2 CLB No. 4, p. 56.

New York Appellate Division "[T]he peremptory substitution, at the time of sentencing, of assigned counsel in place of defendant's absent retained counsel, without defendant's express consent, deprived defendant of a substantial constitutional right." People v. Fitch, 25 A.D.2d 783, 2 CLB No. 6, p. 52.

§5.45. Motion for new trial

Court of Appeals, 5th Cir. Where, because of court reporter's failure to take down summations, indigent defendant can only raise prejudicial nature of prosecutor's comments as an appellate issue by first moving for a new trial, the motion for the new trial becomes a critical stage in the proceeding at which the defendant is entitled to counsel. Bland v. Alabama, 356 F.2d 8, 12 CLB No. 1, p. 39.

Florida An indigent defendant is entitled to be represented by assigned counsel at a belated renewal of his motion for a new trial where his original motion made by his trial attorney (who had since departed from case) was never passed upon by trial court, where motion involved "many delicate and technical constitutional questions," and where purpose of renewal of motion is to obtain a belated appeal. Harper v. Florida, 201 So.2d 65, 3 CLB 583.

Indiana Public defender not required to represent petitioner seeking post conviction relief (a) where petitioner's claim of self-defense was rejected by the jury and he was found guilty of murder, and (b) where the public defender thoroughly investigated for newly discovered evidence and could not find any. In re Evans, 215 N.E.2d 538, 2 CLB No. 5, p. 50.

§5.50. Probation revocation hearing

Massachusetts Supreme Judicial Court of Massachusetts holds that a defendant is entitled to counsel at hearing on revocation of probation which could result in prison sentence. Rubin v. Commonwealth, 216 N.E.2d 779, 2 CLB No. 6, p. 52.

New York Appellate Division Defendant is entitled to be advised of his right to counsel and to be represented by counsel at probation revocation hearing. People v. Hamilton, 26 A.D.2d 137, 2 CLB No. 8, p. 54.

Oregon An indigent defendant is entitled as a matter of right to assigned counsel at probation revocation hearing. Perry v. Williard, 427 P.2d 1020, 3 CLB 507.

§5.60. Parole revocation hearing

New Mexico "We hold that neither due process nor the applicable statutes require that parolees be provided with appointed counsel or represented by employed counsel when they appear before the parole board in a revocation proceeding." Robinson v. Cox, 419 P.2d 253, 3 CLB No. 1, p. 62.

§5.70. Military court-martial

Court of Appeals, 1st Cir. Former servicemen who received a dishonorable discharge as a result of a court-martial conviction obtained in violation of his right to counsel may mandamus the Secretary of Defense to correct the discharge. Ashe v. McNamara, 355 F.2d 277, 2 CLB No. 1, p. 38.

Court of Appeals, 5th Cir. Military prisoner entitled to federal habeas corpus hearing on claim that he was inadequately represented at court-martial. Gibbs v. Blackwell, 354 F.2d 469, 2 CLB No. 1, p. 37.

Court of Appeals, 10th Cir. An indigent military defendant in a special court-martial prosecuted by a non-legally trained officer is not entitled, as a matter of constitutional law, to be represented by either an attorney or a legally trained officer. It is enough that the defense officer have the qualifications prescribed by Congress in Article 27 of the Uniform Code of Military Justice. Kennedy v. Commandant, 377 F.2d 339, 3 CLB 331.

§5.80. Extradition proceedings

Illinois Supreme Court of Illinois holds that Section 10 of the Uniform Criminal Extradition Act (which gives accused person a right to petition for a writ of habeas corpus and to demand and procure legal counsel) entitles indigent person arraigned on rendition warrant to free court appointed lawyer. People ex rel. Harris v. Ogilvie, 221 N.E.2d 265, 3 CLB No. 1, p. 53.

§5.90. Grand jury proceedings

Arkansas Witnesses subpoenaed to appear before prosecuting attorney, sitting as a grand jury, have the right to have their attorneys present at the examination. Gill v. State, 416 S.W.2d 269, 3 CLB 579.

§6.00. Habeas corpus and other post-conviction collateral proceedings

Alabama Petitioner in habeas corpus proceeding whose retained counsel did not appear and who had no money to retain other counsel, was not deprived of his statutory or constitutional rights when the trial court denied his writ without assigning new counsel. Sullivan v. State, 181 So.2d 518, 2 CLB No. 2, p. 55.

Idaho In the absence of a request, a showing of indigency, and special circumstances, there is no requirement that counsel be appointed at a habeas corpus hearing. Wilbanks v. State, 428 P.2d 527, 3 CLB 509.

New York ". . . [A]n indigent mental patient, who is committed to an institution, is entitled, in a habeas corpus proceeding, (brought to establish his sanity), to the assignment of counsel as a matter of constitutional right." People ex rel. Rogers v. Stanley, 17 N.Y.2d 256, 2 CLB No. 5, p. 51.

New York An indigent defendant has a right to assigned counsel at a coram nobis hearing. People v. Monahan, 17 N.Y.2d 310, 2 CLB No. 5, p. 51.

Pennsylvania ". . . [A]bsent unusual circumstances, there is no constitutional right to the assistance of counsel in habeas corpus proceedings. However, even in the absence of constitutional compulsion, we are of the view that the far better practice is to appoint counsel, especially where the issue presented requires an ability to organize complex factual data, or to elicit

testimony in a logical and orderly fashion." Commonwealth v. Russell, 220 A.2d 632, 2 CLB No. 8, p. 47.

§6.10. Appeals – In general

Court of Appeals, 8th Cir. Unrepresented appellant whose appeal was decided after *Douglas* v. *California,* 372 U.S. 353 was denied equal protection of law by state court's denial of his request for appellate counsel. Bosler v. Swenson, 363 F.2d 154, 2 CLB No. 7, p. 38.

Colorado Trial court's refusal to assign counsel to convicted indigent defendant who seeks to prosecute writ of error (direct appeal) is an abuse of discretion.

Defendant's failure to submit affidavit of indigency should have been temporarily waived since only several days remained to file the writ, and the trial judge had himself assigned counsel at the trial. Adargo v. People, 411 P.2d 245, 2 CLB No. 4, p. 54.

Connecticut Where, pursuant to state criminal procedure, sentenced defendant sought review of his sentence before review board, he was entitled to assistance of counsel as a matter of right. Consiglio v. Warden, 220 A.2d 269, 2 CLB No. 8, p. 55.

Kansas The dismissal of a defendant's *pro se* appeal two years after his filing of a notice of appeal constitutes a denial of due process where the defendant failed to prosecute his appeal due to lack of advice or assistance of counsel. Porter v. State, 414 P.2d 56, 2 CLB No. 6, p. 44.

Pennsylvania Where appellant, in prior habeas corpus proceeding, litigated the only issues available on direct review from judgment of conviction entered on guilty plea, his contention that he was deprived of the right to counsel on appeal was moot. Commonwealth ex rel. Davis v. Russell, 220 A.2d 858, 2 CLB No. 8, p. 40.

§6.30. Appeals – Right to a second attorney on appeal

Wisconsin *Douglas* v. *California,* 372 U.S. 353 (1963) does not require that indigent appellant be afforded more than two assigned counsel who certify to the court that they can find no meritorious issue to raise on appeal. McLaughlin v. State, 145 N.W.2d 153, 2 CLB No. 10, p. 40.

§6.40. Appeals – Appeals from denial of collateral relief

Ohio Indigent prisoner, on appeal from denial of motion to vacate and set aside sentence, is not entitled to appointment of counsel. State v. Buffington, 219 N.E.2d 614, 2 CLB No. 9, p. 41.

Wisconsin "[I]n order to avoid patently fruitless appointment of counsel, this court in the future will only appoint counsel upon an appeal from a trial court's summary denial of coram nobis when the petition on its face shows that a substantial factual issue or issues on which the availability of the writ turns, as delineated by prior decisions of this court, has been stated. Otherwise the order of the trial court will be summarily affirmed." State v. Randolph, 144 N.W.2d 441, 2 CLB No. 9, p. 56.

§7.00. Ineffectiveness in general

Court of Appeals, 4th Cir. Where, due to an error in complainant's name as it appeared in the indictment, defense counsel did not learn until after trial that complainant had been convicted of perjury, and where defense counsel thereafter unsuccessfully moved for a new trial but neither advised the defendant that the motion had been denied nor took an appeal in his behalf, the defendant was denied due process. Ingram v. Peyton, 367 F.2d 933, 2 CLB No. 10, p. 36.

Illinois Where trial judge indicated his disbelief of defendant's witnesses at first of two non-jury rape trials, defense counsel's failure to seek second trial before different judge constituted inadequate representation. People v. Chatman, 223 N.E.2d 110, 3 CLB 243, 257.

Illinois Where public defender (a) failed to raise objections to confession which was apparently inadmissible; (b) failed to raise issue of validity of search and seizure which was apparently illegal; (c)

failed to question disparity between crime charged and proof elicited; (d) failed to request jury instructions with respect to voluntariness of confession; (e) unnecessarily introduced evidence of defendant's prior criminal record and (f) waived all post-trial motions, court holds that "[a]n independent investigation of this record discloses that it is replete with evidence of a lack of diligence on the part of court-appointed counsel in violation of appellant's right to a fair trial." People v. Odom, 218 N.E.2d 116, 2 CLB No. 8, p. 53.

§7.01. Delay in assigning counsel

Court of Appeals, 9th Cir. Ten minute interval between assignment of counsel and commencement of three day robbery trial held not to violate defendant's right to effective assistance of counsel. Allen v. Wilson, 365 F.2d 881, 2 CLB No. 9, p. 33.

Florida Where the trial court, at the date set for trial, assigned counsel, accepted a guilty plea and took testimony, petitioner's claim that he was deprived of the effective assistance of counsel should not have been dismissed without a hearing. Ross v. State, 181 So.2d 200, 2 CLB No. 2, p. 55.

Florida That accused was assigned counsel on the same day that he was arraigned and tried was not a basis for claiming a deprivation of his right to counsel where he fully admitted his guilt and was advised to enter a guilty plea. Simpson v. State, 181 So.2d 185, 2 CLB No. 2, p. 55.

Oklahoma Appointment of counsel five days before trial was early enough, as no "critical" stage occurred before that. Bell v. State, 430 P.2d 841, 3 CLB 583.

§7.02. Duty of assigned counsel

Court of Appeals, District of Columbia U. S. Court of Appeals for D.C. Circuit indicates that counsel assigned by a committing magistrate to an indigent defendant in the District of Columbia must remain in case until prosecution is terminated or until other counsel is assigned in the trial court. His duties include seeking review of his client's bail conditions where appropriate and informing his successor counsel, by way of a brief report, of all action previously taken and of any information relevant to the defendant's case. Shackelford v. United States, 383 F.2d 212, 3 CLB 484.

Court of Appeals, 5th Cir. If defendant told his attorney that he had testified falsely, attorney had a duty to report this to court and court properly declared a mistrial. Defendant could not claim double jeopardy when retried. McKissick v. United States, 379 F.2d 754, 3 CLB 399.

§7.05. Representation by several different attorneys

Kentucky Defendant has not been denied effective counsel because he was represented by different assigned counsel at the preliminary hearing and at trial. Henderson v. Commonwealth, 396 S.W.2d 313, 2 CLB No. 2, p. 55.

§7.10. Conflict of interest in joint representation

Court of Appeals, 4th Cir. A single attorney cannot effectively represent one defendant who denies his guilt and a co-defendant who not only confesses his own complicity, but also accuses the other of participating in the crime. Sawyer v. Brough, 358 F.2d 70, 2 CLB No. 4, p. 39.

Florida The assignment of two attorneys jointly to represent two defendants violates the right to effective assistance of counsel of each defendant. Baker v. State, 202 So.2d 563, 3 CLB No. 9, p. 660.

Kansas Trial court's refusal to (a) assign separate counsel where possibility of conflict existed and (b) permit reasonable postponement to prepare case, held reversible error. State v. Young, 410 P.2d 256, 2 CLB No. 3, p. 65.

New Mexico Where the statements of one defendant implicated his codefendant the trial court was required to assign separate counsel for each indigent defendant. Conviction reversed despite the fact that no objection was made to the joint representation. State v. Tapia, 411 P.2d 234, 2 CLB No. 4, p. 45.

New York Where a conflict of interest suddenly arises in the course of a trial between two defendants both represented by the same attorney, counsel should at the very least apprise the court of the situation and seek leave to withdraw as to one of his clients. People v. Byrne, 17 N.Y.2d 209, 2 CLB No. 5, pp. 16, 29.

Wisconsin Representation by one lawyer of two codefendants does not *per se* deny defendant effective assistance of counsel. Mueller v. State, 145 N.W.2d 84, 2 CLB No. 10, p. 59.

§7.15. Other conflicts of interest

Court of Appeals, 2nd Cir. A defendant's right to effective assistance of counsel is not violated by his attorney's undisclosed earlier representation of a key prosecution witness on an unrelated charge where prosecution witness has waived any possible attorney-client privilege by reason of his statements to the police and attorney's cross-examination of prior client is vigorous and exhaustive. Olshen v. McMann, 378 F.2d 993, 3 CLB 331.

Court of Appeals, 10th Cir. In habeas corpus appeal by New Mexico state prisoner, Tenth Circuit disapproves of state court assigning, as counsel to indigent defendant, attorney who is a member of same law firm as prosecutor. Court declines, however, to reverse because point was not raised below and no showing of prejudice was made. Maxie v. Cox, 357 F.2d 335, 2 CLB No. 3, p. 52.

New York Appellate Division *Coram nobis* hearing ordered to determine whether petitioner was deprived of the effective assistance of counsel where his lawyer at the time he entered a guilty plea to the charge of burglary was the brother of the probable complaining witness. People v. Stone, 25 A.D.2d 950, 2 CLB No. 7, p. 51.

New York Defendant entitled to be represented by counsel in connection with hearing on motion to withdraw his guilty plea. He is not represented where his counsel does not join him in his motion and counsel is later called as a witness. People v. Rozzell, 20 N.Y.2d 712, 3 CLB 397, 409.

Virginia Virginia Supreme Court of Appeals disapproves practice of assigning Commonwealth Attorney to represent indigent defendants. It also disapproves practice of trying incarcerated defendant in his prison clothes. Court holds that defendant was not prejudiced when his defense attorney, acting in his capacity as Commonwealth Attorney, served him with an arrest warrant after the trial was completed. Yates v. Peyton, 147 S.E.2d 767, 2 CLB No. 6, p. 52.

§7.20. Limitations placed on the right of attorney and client to confer

United States Supreme Court Trial court's action in remanding defendant for duration of trial for single, brief incident of tardiness was unjustified and constituted an unwarranted burden upon defendant and his counsel in the conduct of the case. Bitter v. United States, 389 U.S. 15, 3 CLB 634.

Court of Appeals, 10th Cir. Defendants who were required by trial judge to sit in jury box away from the side of their attorney during hearing on motion to suppress were not denied effective assistance of counsel where no objection was ever raised and it appears they were allowed to confer with their attorney on several occasions during the course of the hearing. Anderson and Reese v. United States, 367 F.2d 553, 2 CLB No. 9, p. 33.

Illinois Trial judge's refusal to allow *pro se* defendant to communicate with anyone during the trial was reversible error. People v. Martin, 228 N.E.2d 557, 3 CLB 572.

Mississippi Court's admonition that defendant and her attorney were not to discuss the case during a two hour adjournment is a deprivation of the right to counsel. Prendergraft v. State, 191 So.2d 830, 3 CLB 64.

Pennsylvania Preventing defendant from seeing his trial attorney or discussing the case with him during a noon day recess of trial constitutes a violation of the right

to counsel for which the defendant need not show any prejudice to obtain a reversal. Commonwealth v. Vivian, 231 A.2d 301, 3 CLB 583.

Pennsylvania Court's direction that defendant not discuss his testimony with his counsel during a seventeen-hour recess, following an adjournment granted in the course of the cross-examination of the defendant, held to be reversible error without a showing of actual prejudice. (See *U.S.* v. *Venuto,* 182 F.2d 519 (3rd Cir., 1950)). Commonwealth v. Werener, 214 A.2d 276, 2 CLB No. 1, p. 48.

§7.25. Censorship of mail from prisoner to his attorney

Court of Appeals, 10th Cir. Warden's communication to state attorney general of contents of prisoner's letter to his attorney was highly improper, but absent some showing that it prevented effective representation, it was not reversible error. Cox v. Crouse, 376 F.2d 824, 3 CLB 328.

§7.28. Presence of guards in conference room at jail

California "It appears that three or four deputy sheriffs were seated in the conference room as guards. Although the deputies testified that they did not listen to defendant's conversation with Mr. Miller, one of them admitted that if he had been concentrating his attention on the discussion he probably could have overheard it. We disapprove of this practice, which jeopardizes a prisoner's right to private consultation with his attorney without the presence of law enforcement officers, even though within the confines of a jail." In re Poe, 415 P.2d 784, 2 CLB No. 8, p. 53.

§7.40. Inadequate time to prepare defense

Court of Appeals, 2nd Cir. Even if defendant was given enough time to retain a new attorney and failed to do so, the trial court's offer of assigned counsel with one hour to prepare for trial was grossly inadequate. United States ex rel. Davis v. McMann, 386 F.2d 611, 3 CLB 641.

Court of Appeals, 4th Cir. Defendant was effectively represented by counsel at his state recidivist trial even though his court-assigned attorney had 75 other recidivist hearings on the same day and he did not bother to examine the formal court records of the underlying convictions. Horne v. Peyton, 356 F.2d 631, 2 CLB No. 3, p. 52.

Court of Appeals, 4th Cir. Fourth Circuit holds that lapse of only three and a half hours between indictment, appointment of counsel and trial, makes likelihood of prejudice from inadequate assistance of counsel sufficiently great to warrant setting aside of conviction. Martin v. Peyton, 365 F.2d 549, 2 CLB No. 8, p. 34.

§7.52. Failure to make opening statement or summation

Maryland Counsel's failure to make either an opening statement or a summation does not automatically demonstrate his incompetency. Hickman v. State, 218 A.2d 21, 2 CLB No. 5, p. 44.

§7.60. Failure of trial counsel to protect client's appellate rights

Court of Appeals, 2nd Cir. Failure of retained counsel to protect his client's right to appeal was a denial of the effective assistance of counsel. United States ex rel. Maselli v. Reincke, 383 F.2d 129, 3 CLB 490.

Court of Appeals, 5th Cir. Where defendant was convicted of murder in the first degree but was spared the death penalty, defense counsel's unilateral decision to forgo an appeal in the face of what he believed to be meritorious grounds, without consulting or obtaining the consent of the defendant, constituted ineffective representation at a critical stage in the proceedings and did not constitute a waiver of the right to appeal. Wainright v. Simpson, 360 F.2d 307, 2 CLB No. 5, p. 32.

Court of Appeals, 9th Cir. Although no timely notice of appeal was ever filed, Ninth Circuit reverses indigent defendant's murder conviction for reversible error in the charge where defendant's

trial counsel advised him after sentence that an appeal could not succeed and that, in any event, the record would cost $5,000. Doyle v. United States, 366 F.2d 394, 2 CLB No. 9, p. 32.

Oregon Where court assigned attorney and public defender filed affidavits seeking leave to withdraw from representation of defendant on appeal attesting that no appealable issue was presented, the court would not assign other counsel. Review of record and defendant's *pro se* brief established that no error was committed at trial. State v. Elliott, 218 P.2d 263, 2 CLB No. 10, p. 59.

Pennsylvania Where indigent defendant convicted of second degree murder failed to appeal and where counsel mistakenly informed him that successful appeal might result in retrial and first degree murder conviction, right to appeal was reinstated. Commonwealth ex rel. Light v. Cavell, 220 A.2d 883, 2 CLB No. 8, p. 40.

§7.65. Trial counsel's admitted ineffectiveness

Court of Appeals, 10th Cir. Although trial counsel testifies at §2255 hearing that he gave defendant ineffective assistance of counsel, court may still determine from trial record that representation afforded defendant was within constitutional standards for effective assistance of counsel. Alire v. U.S., 365 F.2d 278, 2 CLB No. 8, p. 35.

§7.68. Duty of appellate counsel in general

Court of Appeals, District of Columbia D. C. Circuit, in denying assigned appellate counsel's application to withdraw, sets forth his duties both to his client and to the court. Johnson v. United States, 360 F.2d 844, 2 CLB No. 5, p. 39.

Idaho Conviction based upon defendant's plea of guilty made without the assistance of counsel set aside where defendant claims that he did not understand his right to counsel, and, although state was obliged to record all proceedings in open court, the proceedings of his plea were never recorded. It is a denial of due process to force petitioner to place his word against that of the trial judge. Ebersole v. State, 428 P.2d 947, 3 CLB 509-10.

Pennsylvania "It is not our impression that the *Douglas* decision *(Douglas* v. *California,* 372 U.S. 353) was intended merely to replace counsel for the courts as a screen to determine which cases have sufficient merit to warrant the appointment of counsel for the prosecution of an appeal. In our view, the mere fact that counsel did not consider appellant's prospects on appeal as favorable was not of itself sufficient grounds for holding that appellant's constitutional right to the assistance of counsel on appeal had been fully satisfied. That right embodies more than the right to the assistance of counsel in 'meritorious cases'; it embodies the right to representation on appeal *if the defendant so desires,* whatever the prospects of success may appear to be to the court or counsel." (emphasis supplied) Commonwealth ex rel. Newsome v. Myers, 220 A.2d 886, 2 CLB No. 8, p. 40.

§7.70. Waiver of right to counsel — in general

Michigan Mere fact that defendant was only 18 years of age at the time he entered guilty plea did not render his waiver of counsel ineffective. People v. Shaffer, 144 N.W.2d 680, 2 CLB No. 9, p. 57.

§7.71. Discharge of counsel as waiver of right to counsel

Utah Where, following conviction, a defendant discharges counsel for no apparent reason, the court need not assign other counsel on motion for new trial. Danks v. State, 418 P.2d 488, 2 CLB No. 10, p. 59.

§7.72. Right to defend pro se

New York Appellate Division It was not error for the court to assign attorneys to defendants, charged with murder, who expressed a wish to defend *pro se.*

> "Generally, however, if a defendant should not wish to have such assistance it may not be forced on him. In this case, however, there was no prejudice and defendants ultimately utilized such assistance."

People v. Pitman, 25 A.D.2d 637, 268 N.Y.S.2d 83, 2 CLB No. 5, p. 51.

§7.75. Burden of proof at hearing as to waiver

Court of Appeals, 10th Cir. Where petitioner in collateral proceeding unequivocally testifies that he was not advised of his right to counsel, docket entry that he was advised of his "rights" and trial judge's statement of general practice will not support finding that he was so advised. Browning v. Crouse, 356 F.2d 178, 2 CLB No. 3, p. 53.

Ohio Where trial court's journal entry indicated that defendant declined counsel after having been asked whether "he wished to be represented by counsel" and where trial judge's affidavit stated that it was his "undeviating practice" to "explain to a defendant his rights and inquire if he desires counsel," trial court erred in granting defendant's writ of habeas corpus solely on strength of defendant's uncorroborated testimony that he was not aware of his right to free court-assigned counsel and had not been informed of that right. Halleck v. Koloski, 212 N.E.2d 601, 2 CLB No. 2, p. 57.

Texas Trial court's statement that he would always appoint counsel "if one was requested" is not sufficient to establish that petitioner was represented by counsel at time he waived a jury trial. Ex parte Huffman, 415 S.W.2d 408, 3 CLB 509.

§7.80. Sufficiency of advice re the right to counsel

Court of Appeals, 5th Cir. Asking, defendant if he wants a lawyer does not satisfy requirement that he be advised of his right to counsel. Lastinger v. United States, 356 F.2d 104, 2 CLB No. 2, p. 42.

District of Columbia. Defendant's misdemeanor convictions were obtained in violation of their Sixth Amendment rights where judge proceeded to try them without counsel after merely asking each defendant, "Do you have a lawyer?" and "Do you want a lawyer?" and receive a simple "No" answer to each question. Gibson and Jackson v. District of Columbia, 221 A.2d 715, 2 CLB No. 9, p. 57.

Florida Trial court's informing of the defendant's right to counsel held to be inadequate. McKenzie v. State, 187 So.2d 69, 2 CLB No. 7, p. 51.

Michigan Defendant who, while awaiting his arraignment, hears another being advised that he has a right to court appointed counsel, if indigent, is not sufficiently advised of that right and the judgment of conviction entered on his plea of guilty must be vacated. People v. Richardson, 145 N.W.2d 380, 2 CLB No. 10, p. 61.

New York Appellate Division Trial court's advice to defendant charged with violation of probation that "he was entitled to counsel unless he should plead guilty, in which event he would not be entitled to counsel, but that if he had a hearing, he could have counsel," held to be incorrect, and misleading and required the order revoking probation to be set aside. People v. Reynolds, 266 N.Y.S.2d 604, 2 CLB No. 3, p. 65.

Oklahoma Record which indicates that defendant was told he had a "right to counsel" but which does not show that he was ever offered counsel held insufficient to support a waiver. Cantwell v. Page, 425 P.2d 1010, 3 CLB 309, 338.

§7.85. Right to additional offer of counsel at subsequent stages of proceeding

Court of Appeals, 5th Cir. Although he knowingly rejects offers of counsel at both the arraignment and the commencement of trial, defendant is entitled to have his conviction set aside where the court fails to offer him counsel a third time in connection with his change of plea. Davis v. Holman, 354 F.2d 773, 2 CLB No. 1, p. 41.

§8.00. Co-defendant's statement

Court of Appeals, 2nd Cir. Where (1) the defendant was named as an accomplice in his co-defendant's confession, (2) co-defendant did not testify, (3) prosecutor used confession against the defendant in his

summation, (4) confession could have been easily redacted, and (5) case against defendant was otherwise weak, conviction violated due process. United States ex rel. Floyd v. Wilkins, 367 F.2d 990, 2 CLB No. 9, p. 28.

California Supreme Court of California changes existing rule governing admissibility of confession of one defendant which implicates a co-defendant. People v. Aranda, 407 P.2d 265, 47 Cal. Rptr. 353, 2 CLB No. 1, p. 63.

Illinois Where confession of defendant is admitted into evidence, there is no prejudicial error in also admitting incriminating confession of co-defendant substantially in accord with defendant's confession. People v. Strayhorn, 219 N.E.2d 517, 2 CLB No. 9, p. 43.

New Jersey Conviction reversed where trial court refused to excise that portion of defendant's confession which implicated his non-confessing co-defendant. State v. Taylor, 217 A.2d 1, 2 CLB No. 4, p. 52.

New York Where the confession of a co-defendant implicated the defendant by name and where the Appellate Division held the confession inadmissible as to the co-defendant and ordered a new trial, appellant's conviction should also have been reversed in the interests of justice. People v. Cender, 18 N.Y.2d 610, 2 CLB No. 7, p. 43.

New York Where the statements taken from the defendant in violation of his right to counsel also implicated his co-defendant, the co-defendant's conviction was reversed "in the interests of justice." People v. Morgan and Hartwell, 17 N.Y.2d 696, 2 CLB No. 4, p. 46.

New York Appellate Division Confession of accomplice which implicated the defendant received in evidence as a past recollection recorded. People v. Caprio, 25 A.D.2d 145, 2 CLB No. 5, p. 48.

§8.15. Use of witness' prior testimony (See also §47.35.)

Court of Appeals, 5th Cir. Where, on a murder retrial, state has not made a diligent effort to locate and produce witness who testified at the first trial, reading witness' original testimony to the jury constituted a denial of the defendant's right of confrontation. Holman v. Washington, 364 F.2d 618, 2 CLB No. 8, p. 31.

§8.20. Waiver

Massachusetts Defendant's right to be present during the hearing into the voluntariness of his confession, is waived, where the Court holds that portion of the trial in the "judge's lobby," where there is no request by defense counsel that defendant be present, no objection or exception to the defendant's absence, and no request that evidence given during defendant's absence be stricken from the record and where the portion of the hearing missed by the defendant is very brief, consisting of less than three pages of double-spaced typewritten transcript of one witness' testimony. Amado v. Commonwealth, 212 N.E.2d 205, 2 CLB No. 1, p. 51.

New Mexico Defendant has no right to confront or cross-examine victim of alleged assault and battery where victim does not testify. State v. James, 415 P.2d 350, 2 CLB No. 8, p. 54.

§9.00. What constitutes a search

Florida The fact that police used party line to overhear defendant's conversation does not violate his constitutional rights. Lee v. State, 191 S.2d 84, 3 CLB No. 1, p. 71.

Kentucky Marijuana in open sack is not in plain view where officer is only able to identify substance after reaching into bag removing a sample and examining it. Nichols v. Commonwealth, 408 S.W.2d 189, 3 CLB 65.

Mississippi Peering into a pay toilet in a public rest room held not to constitute a search. Craft v. State, 181 So.2d 140, 2 CLB No. 2, p. 57.

Nebraska Police officer's act of directing his flashlight into car which he had just stopped on suspicion did not consti-

tute a search. State v. Carpenter, 150 N.W.2d 129, 3 CLB No. 6, p. 428.

§9.01. What constitutes an arrest

Court of Appeals, District of Columbia Failure of police officers to formally announce to defendant that he is under arrest does not vitiate subsequent search where subjective state of mind of both the officers and the defendant is that defendant is under arrest. Brown v. United States, 365 F.2d 976, 2 CLB No. 7, p. 40.

Court of Appeals, 9th Cir. The brief detention of a person standing in a crowd at the scene of the arrest of a bank robber held justifiable where the person searched was pointed out as a possible second suspect and there was some indication that a second person was involved. Arnold v. United States, 382 F.2d 4, 3 CLB 491.

Alabama Where the defendant was arrested in Florida and returned to Alabama to stand trial for murder committed in that state, the Alabama court applied the Florida law to determine the validity of the arrest and subsequent search. Tiner v. State, 182 So.2d 859, 2 CLB No. 4, p. 46.

Mississipi A prima facie case of illegal arrest and detention was established by the defendant's unrebutted testimony that the arresting officer failed to advise him of the reason for arrest. The statements and property taken from defendant after the arrest should have been excluded. Clay v. State, 184 So.2d 403, 2 CLB No. 5, p. 54.

New Jersey Arrest occurred when defendant was ordered to get in patrol car and not when he was initially stopped by a borough policeman; issue was critical because of lower court's determination that the defendant's arrest was illegal on the ground that the borough police officer effected the arrest outside of the borough where he was empowered to act. State v. Harbatuk, 229 A.2d 820, 3 CLB 496.

New York Appellate Division Arrest took place when appellants were asked at gunpoint to get out of their car. People v. McGroder, 26 A.D.2d 615, 2 CLB No. 8, p. 54.

§9.02. Constitutionally protected areas

Court of Appeals, 8th Cir. Observations and seizure of physical evidence made by federal agents as a result of a trespass onto defendant's farm property held not a violation of the Fourth Amendment where they took place in two corn fields one-half mile north and south of main farmhouse. Fields held to be "open fields" and not part of protested curtilage surrounding dwelling. McDowell v. United States, 383 F.2d 599, 3 CLB 561.

New York Appellate Division Hospital room is constitutionally protected property within meaning of Fourth Amendment. People v. Rial, 25 A.D.2d 28, 2 CLB No. 3, p. 57.

§9.05. Property subject to seizure

United States Supreme Court Supreme Court rejects "mere evidence" rule. Warden v. Hayden, 387 U.S. 294, 3 CLB 321.

Court of Appeals, 2nd Cir. Trustee in Bankruptcy's removal of records of bankrupt corporation from office of corporation president was not a violation of latter's Fourth Amendment rights. United States v. Masterson, 383 F.2d 610, 3 CLB 550, 568.

Court of Appeals, 5th Cir. Where a search warrant authorizes a search for *saving* stamps, and no arrest is made during the execution of the warrant, a seizure of *postage* stamps found in the search is nonetheless lawful, the latter being stolen and therefore contraband. Aron v. United States, 382 F.2d 965, 3 CLB 560.

Court of Appeals, 8th Cir. Where person is legally arrested, seizure of the clothing he is wearing does not violate Fourth Amendment provision banning unreasonable searches and seizures. Golliher, et al., v. United States, 362 F.2d 594, 2 CLB No. 7, p. 38.

Court of Appeals, 10th Cir. Where prison officials had reasonable grounds for believing that the defendant had killed a fellow prison inmate, the Warden's removal of his clothes was not a violation of his Fourth Amendment rights. Hayes

v. United States, 367 F.2d 216, 2 CLB No. 10, p. 42.

Iowa Iowa Supreme Court rejects "mere evidence" rule. Evidence may be seized for its inculpatory value alone, so long as the search is not otherwise unreasonable. State v. Raymond, 142 N.W.2d 444, 2 CLB No. 6, p. 53.

Michigan *Mapp* v. *Ohio,* 367 U.S. 463, does not invalidate Michigan constitutional provision permitting introduction into evidence of narcotics or dangerous weapons seized without probable cause outside curtilage of dwelling. People v. Blessing, 142 N.W.2d 709, 2 CLB No. 7, p. 57.

New York Appellate Division Fact that eavesdropping pursuant to court order uncovered "mere evidence" in form of conversation held not to bar use of evidence at trial. People v. Goldman, 280 N.Y.S.2d 525, 3 CLB 50.

§9.10. Search warrant – in general

Court of Appeals, 1st Cir. Search warrant which failed to state the time of observation held invalid. Rosencranz v. U. S., 356 F.2d 310, 2 CLB No. 2, p. 42.

California Search warrant issued by court clerk who merely "witnessed" police officer's signature held invalid where statute requires issuing officer to "examine affiant" in regard to the affidavit. State v. Upchurch, 148 S.E.2d 258, 2 CLB No. 7, p. 52.

§9.15. Search warrant – sufficiency of underlying affidavit

Court of Appeals, 2nd Cir. Second Circuit sustains issuance of warrant based only upon hearsay statement of informant that he observed narcotics and statement of affiant that informant was "reliable." U.S. v. Robert Freeman, 358 F.2d 459, 2 CLB No. 4, p. 41.

Court of Appeals, 2nd Cir. Officer's affidavit based entirely on statements of a confidential informant, showing no basis for officer's conclusion that informant is reliable, states probable cause for issuance of a search warrant if the officer tells the issuing magistrate that an arrest had already been made in the case. United States ex rel. Schnitzler v. Follete, 379 F.2d 846, 3 CLB 492.

California The magistrate did not abuse his discretion in issuing a warrant for search of narcotics in the nighttime despite the fact that the affidavit neither requested permission for nighttime search nor stated reasons therefor. Court takes judicial notice that "heroin pushers are as active at night as during the day and probably more so." Solis v. Superior Court, 408 P.2d 945, 2 CLB No. 2, p. 57.

New York Where a search warrant was issued on the basis of the observations of a confidential informant, the failure to substantiate the informant's reliability was not fatal to the validity of the warrant. It was enough that the officer stated to the issuing judge that the informant was reliable. However, the issuing judge should preserve a record of the officer's statement. People v. Schnitzler, 18 N.Y.2d 457, 3 CLB 66.

New York Where affidavit underlying search warrant failed to set forth facts supporting informer's reliability, but affiant testified at suppression hearing that magistrate had asked him whether informer was reliable and affiant replied that he was, the issuance of the warrant was sustained. People v. Schnitzler 18 N.Y.2d 457, 2 CLB No. 10, p. 62.

North Carolina Police officer's affidavit containing conclusory allegation that "a person known to me to be reliable" has just seen the defendant in possession of a quantity of peyote and further stating that a sample produced by the informant has been analyzed as peyote and further stating that a sample produced by the informant has been analyzed as peyote held sufficient to justify issuance of search warrant. State v. Bullard, 148 S.E.2d 565, 2 CLB No. 7, pp. 10, 28.

Oregon Information obtained by eavesdropping unaccompanied by either a trespass or electronic device was properly used to support issuance of search war-

rant. State v. Cartwright, 418 P.2d 822, 2 CLB No. 10, p. 61.

§9.30. Search warrant – manner of execution

Court of Appeals, 3rd Cir. Federal agents were "refused admittance" within the meaning of 18 U.S.C. 3109 (allowing them to break into defendant's home to execute a warrant for his arrest) when, after announcing their authority and purpose, they saw the defendant's sister running away from the front door and calling the defendant's name. United States v. Augello, 368 F.2d 692, 2 CLB No. 10, p. 41.

Arizona The fact that police officers armed with a search warrant attempted to employ a ruse in gaining entry to an apartment does not affect the validity of the search warrant or the search made under its authority. State v. Valenzuela, 413 P.2d 738, 2 CLB No. 6, p. 53.

Maryland Where police officers had warrant for defendant's arrest based upon defendant's assault of girl friend, they could enter his home under the authority of the warrant. They were not required to wait outside in the hallway even though requested to do so by defendant. Evidence of unconnected crime in plain view was properly seized. Nestor v. State, 221 A.2d 2 CLB No. 8, p. 54.

New York New York Court of Appeals unanimously upholds statute permitting unannounced entry of police into private dwelling where warrant, based upon affidavit indicating probability of destruction of evidence, permits such entry. People v. DeLago, 16 N.Y.2d 289, 2 CLB No. 1, p. 61.

§9.40. Search warrant – necessity of obtaining a warrant

Court of Appeals, 9th Cir. Customs agents' warrantless search of package at airport held unreasonable under the Fourth Amendment even though agents had probable cause to believe package which has just been delivered by defendant to air carrier in Los Angeles for transportation to New York contained smuggled Swiss watch parts, and even though the carrier had authority to open the package under the terms of the shipping tariff and its employee consents to and participates in the search. Corngold v. United States, 367 F.2d 1, 2 CLB No. 9, p. 34.

§10.00. Search incident to a valid arrest – in general

Colorado Searches of defendant's person and automobile removed in time and place from his valid arrest upheld as incident thereto. Stewart v. People, 426 P.2d 545, 3 CLB 309, 337.

Nevada Where court found probable cause to arrest for rape, the search of defendant's person was held to be a valid search incident to that arrest, notwithstanding officer's testimony that the arrest was made under disorderly person statute. Nottenboom v. State, 418 P.2d 490, 2 CLB No. 10, p. 63.

Washington Warrantless search of petitioner's apartment after his arrest on the front porch of the multiple dwelling upheld as incident to the arrest. Affidavits reciting facts tending to establish probable cause may be considered by the habeas court notwithstanding that those facts were not testified to at the trial. Little v. Rhay, 413 P.2d 15, 2 CLB No. 5, p. 53.

Washington Marijuana discovered during general search of apartment for stolen credit card was not unreasonably seized where police had gone to apartment armed with arrest warrant on assault charge and had placed defendant under arrest just inside front door; where credit card was evidence in assault case; and where defendant, although only a guest in the apartment, was its sole occupant and had apparent access to the entire area. State v. Bullock, 431 P.2d 195, 3 CLB 661.

§10.10. Search incident to a valid arrest – probable cause

Court of Appeals, District of Columbia Discrepancies in police look-out broadcast are irrelevant if there is sufficient particularized information to constitute

probable cause. Brown v. United States, 365 F.2d 976, 2 CLB No. 7, p. 40.

Court of Appeals, District of Columbia Facts underlying informant's conclusion that defendant possessed narcotics not necessary to establish probable cause where other information known to agents corroborates informant's conclusory statements. Smith v. United States, 356 F.2d 868, 2 CLB No. 3, p. 49.

Florida Where police officers begin tracking a suspected criminal with a bloodhound, and then began following another trail upon an anonymous tip, the subsequent arrest and search were illegal. Gossett v. State, 188 So.2d 836, 2 CLB No. 9, p. 58.

Maryland Fact that arresting officer did not recall the details of the police broadcast upon which he relied to make an arrest did not invalidate the arrest where the officer who made the broadcast recalled its contents. Jones v. State, 218 A.2d 7, 2 CLB No. 5, p. 53.

New York Information from anonymous informant insufficient to establish probable cause where there is no showing of prior reliability and where the police officer's corroboration is limited to totally innocent conduct. People v. Horowitz, 21 N.Y.2d 55, 3 CLB 695, 707.

New York Fact that informant's story could have easily been tested (although it was not) is a factor to be weighed in determining probable cause. People v. Montague, 19 N.Y.2d 121, 3 CLB 88, 99.

New York Where the police officer, a conceded expert in the game of policy, observed six persons:

(a) approach the defendant;

(b) engage him in brief conversation;

(c) hand him money in bill form; and

saw the defendant make notations on a slip of paper after three of the conversations, the officer had probable cause to believe that the defendant was committing a misdemeanor in his presence. The arrest and the search incident thereto were proper. Judgment of conviction affirmed. People v. Valentine, 17 N.Y.2d 128, 2 CLB No. 4, p. 57.

Wyoming Police officer who received radio alarm to apprehend burglary suspects had probable cause to arrest. Whiteley v. State, 418 P.2d 164, 2 CLB No. 10, p. 63.

§10.15. Search incident to a valid arrest — combined police information in determining probable cause

Court of Appeals, 5th Cir. Where the police had probable cause to arrest the defendant, but instead he was arrested by other officers acting independently on a command from headquarters, the arrest was valid. Miller v. United States, 356 F.2d 63, 2 CLB No. 2, p. 43.

§10.50. Search incident to a valid arrest — general search

Illinois Seizure of "all copies" of allegedly obscene book held invalid. People v. Kimmel, 217 N.E.2d 785, 2 CLB No. 8, p. 51.

Oklahoma Defendant was lawfully arrested on a warrant for burglary, but narcotics seized from his house must be suppressed as the product of a general exploratory search incident to such arrest. Handley v. State, 430 P.2d 830, 3 CLB 584.

§11.00. Consent — in general

United States Supreme Court Deception employed by undercover narcotics agent resulting in invitation to suspect's home and negotiation and sale therein of a quantity of narcotics held neither a constitutionally impermissible form of "official deception" nor a violation of the Fourth Amendment. Lewis v. United States, 385 U.S. 206, 35 LW 4072, 3 CLB 33.

United States Supreme Court Defendant's incriminating statements not made to his attorney and overheard by government informer who "infiltrated" defendant's hotel suite with defendant's knowledge during the course of the trial of one criminal case may constitutionally be used against him in a subsequent trial on a different charge. Hoffa et al. v. United States, 385 U.S. 293, 3 CLB 34.

§11.10. Consent – third party consents

Court of Appeals, 2nd Cir. Where owner of leased premises is innocently implicated in tenant's illegal use of property, he has right to exculpate himself by permitting a search of the property. U.S. v. Botsch, 364 F.2d 542, 2 CLB No. 8, p. 36.

Court of Appeals, 5th Cir. Defendant has no standing to complain where evidence used against him at his trial for possessing stolen mail was seized from his car in a warrantless search consented to by the chattel mortgagee who had sometime prior to the search legally repossessed it. Johnson v. United States, 358 F.2d 139, 2 CLB No. 4, p. 43.

Mississippi Fifteen year old son's consent to police officer's search of family home after his father had been removed therefrom and taken to jail did not waive father's rights to object to legality of search. May v. State, 199 So.2d 635, 3 CLB 510.

New Jersey Warrantless police entry into fugitive's apartment upheld where police are requested to come by fugitive's roommate and police know of existence of outstanding arrest warrant. State v. Miller, 220 A.2d 409, 2 CLB No. 8, pp. 19, 26.

Oregon Where defendant's roommate consented to search of defendant's travel bag in which both parties kept possessions, the seizure of the defendant's clothing from the bag was valid. State v. Frazier, 418 P.2d 841, 3 CLB 67.

Pennsylvania Warrantless search of defendant's hotel room with manager's consent, two hours after arrest held illegal. Commonwealth v. Ellsworth, 218 A.2d 249, 2 CLB No. 5, p. 55.

§11.30. Consent – voluntariness of consent

Court of Appeals, 1st Cir. First Circuit holds that householder who opens door in response to police officer's request to talk and then steps back, has invited officer in and thereby consented to entry. The officer is not a trespasser. Robbins v. Mackenzie, 364 F.2d 45, 2 CLB No. 8, p. 37.

Court of Appeals, 1st Cir. Where undercover agent posing as buyer of narcotics thereby gains invitation and entry to defendant's home, there is no illegal search and seizure. "The happy days for law violators that this claim would produce are not to be." Lewis v. U.S., 352 F.2d 799, 2 CLB No. 2, p. 44.

Florida Defendant's invitation to enter premises held to be a consent to a search of his premises. Garcia v. Florida, 186 So.2d 556, 2 CLB No. 7, p. 52.

Florida A parolee has no standing to object to search of his person. Having consented to not violate the law while on parole and still in constructive custody, he is deemed to have waived his right to object. Echols v. State, 201 So.2d 89, 3 CLB 584.

Iowa Tape recording of defendant's second bribe attempt made while officer was, by consent, on defendant's premises was not product of an illegal search and seizure. State v. Taylor, 144 N.W.2d 289, 2 CLB No. 9, p. 58.

§12.00. Stop and frisk

New Jersey Supreme Court of New Jersey upholds police officer's right to stop and frisk defendant where there are suspicious circumstances and sustains defendant's conviction for illegal possession of a concealed weapon even though the weapon was seized as a result of a frisk. State v. Dilley, 231 A.2d 353, 3 CLB 585.

New York Removal of heroin from pocket of suspect upheld as a valid frisk. People v. Sibron, 18 N.Y.2d 603, 2 CLB No. 7, p. 54.

New York New York Court of Appeals upholds stop and frisk law. People v. Peters, 18 N.Y.2d 238, 2 CLB No. 7, p. 54.

Pennsylvania Officer's right to "stop and frisk" upheld. Commonwealth v. Hicks, 223 A.2d 873, 3 CLB 66.

§13.00. Search by private person

Court of Appeals, District of Columbia Where police neither originated nor participated in a search by a private citizen,

the evidence seized was properly received in evidence. Wright v. U. S., 224 A.2d 475, 3 CLB 68.

Court of Appeals, 2nd Cir. In *dictum*, the Second Circuit says that *Burdeau* v. *McDowell*, 256 U.S. 465 (1921), holding that the Fourth Amendment does not prohibit illegal searches and seizures by private persons even if their fruits are used by the Government, is still good law. United States v. McGuire, 381 F.2d 306, 3 CLB 492.

New York Appellate Division Evidence illegally seized by police officers held inadmissible in proceeding to revoke liquor license. Matter of Leogrande v. State Liquor Authority, 25 A.D.2d 225, 2 CLB No. 5, p. 52.

New York Supreme Court Instrumentalities seized from defendant by private individual in unreasonable search and turned over to officials of the state may be used as evidence against defendant in criminal prosecution so long as there has been no pre-arrangement with or connivance by state. People v. Torres, 266 N.Y.S.2d 695, 2 CLB No. 3, p. 67.

Ohio Papers seized by divorced husband from ex-wife's car in violation of the Fourth Amendment may not be received in evidence at hearing on husband's motion for new divorce trial based on newly discovered evidence. Court extends *Mapp* exclusionary rule to civil cases where seizure is made by private citizen. Williams v. Williams, 221 N.E.2d 622, 3 CLB No. 1, p. 69.

§14.00. Border searches

Court of Appeals, 5th Cir. The test for a legal search at an international boundary is the existence of reasonable cause to suspect that there is merchandise which is being introduced into the United States in a manner contrary to law. The Government need not establish the reliability of an informer. Valadez v. United States, 358 F.2d 721, 2 CLB No. 4, p. 41.

Court of Appeals, 9th Cir. The border search of a female against her will and the removal by a doctor of heroin from her vagina was illegal. Henderson v. United States, 390 F.2d 805, 3 CLB 491.

Court of Appeals, 9th Cir. Where the totality of circumstances are such as to convince fact-finder that contraband seized at the time of the search was aboard vehicle at the time of its entry into the United States, search of car fifteen hours and twenty miles after it crossed the border was a valid "border search." Rodriguez-Gonzalez v. United States, 378 F.2d 256, 3 CLB 332.

Court of Appeals, 9th Cir. Search of defendant's automobile fifteen miles from border upheld as border search where customs officers continuously "tailed" car for the entire distance. Leeks v. United States, 356 F.2d 470, 2 CLB No. 3, p. 54.

Court of Appeals, 9th Cir. Agent's forcible removal of narcotics by insertion of tube into stomach of suspected smuggler 12 miles from border neither "shocks the conscience" nor constitutes an unreasonable search. Blefare v. United States, 362 F.2d 870, 2 CLB No. 6, p. 39.

§15.00. Official governmental inspections

United States Supreme Court The Fourth Amendment bars prosecution of a person based upon his refusal to permit a warrantless code enforcement inspection of either his personal residence or commercial property. *Frank* v. *Maryland*, 359 U.S. 360 overruled. Camara v. Municipal Court, 387 U.S. 523, See v. City of Seattle, 387 U.S. 541, 3 CLB 319.

Court of Appeals, District of Columbia Where defendant was arrested as a narcotic vagrant simply because he was present in an automobile in which narcotics had been seized from one of the other occupants, his arrest was without probable cause and the subsequent examination of his arm (disclosing fresh needle punctures) was unreasonable. Lyons v. United States, 221 A.2d 711, 2 CLB No. 9, pp. 10, 39.

New York Police officer's unannounced entry into private room for investigatory purposes upheld pursuant to general ob-

ligation of police to assist people in distress. People v. Gallmon, 19 N.Y.2d 389, 3 CLB 243, 256.

§16.00. Automobile searches

Court of Appeals, 7th Cir. Warrantless search of automobile at federal building held reasonable where it was seized by federal agents in another part of town incident to defendant's valid arrest, and the gathering of a crowd caused the agents to decide to interrupt the search which they had begun and to move out of the area. See *United States* v. *Wallack*, 255 F. Supp. 566, 569 (Weinfeld, J.) "We need no current reminder that arrests in a crowded, substandard neighborhood oftimes trigger explosive action. . . ." United States v. Evans, 385 F.2d 824, 3 CLB 642.

Alabama Warrantless search of defendant's car glove compartment following his arrest and removal from the car was unreasonable. Sheridan v. State, 187 So.2d 299, 2 CLB No. 7, p. 27.

Illinois Where defendant has been seen alighting from parked vehicle after companion has fired shots at officer, search of vehicle without warrant is reasonable even though no one has been arrested. People v. Moore, 220 N.E. 443, 3 CLB No. 1, p. 66.

Kansas Search of car at police station after arrest held incidental to arrest. Court applies harmless error rule to illegally seized evidence. State v. Wood, 416 P.2d 729, 2 CLB No. 9, p. 59.

Kentucky Where defendant was arrested for reckless driving, the officer's peering through small opening in closed trunk of defendant's automobile immediately thereafter constituted an invalid search. Johns v. Commonwealth, 394 S.W.2d 890, 2 CLB No. 1, p. 61.

Minnesota Minnesota Court holds that police officers are duty-bound to stop and search vehicle and occupants under "slightest suspicious circumstances." State ex rel. Ogg v. Tahash, 140 N.W.2d 692, 2 CLB No. 4, p. 43.

Montana Warrantless search of motor vehicle in which defendant was arrested, miles from and hours after the arrest, held to be reasonable. State v. Houchin, 428 P.2d 971 and State v. Armstrong, 428 P.2d 611, 3 CLB 511.

Pennsylvania Search of defendant's car without warrant shortly after arrest in nearby house was valid as incidental to arrest. Commonwealth v. Harris, 223 A.2d 881, 3 CLB 66.

§20.00. Standing

Court of Appeals, 10th Cir. Where defendant has no interest in corporation whose records are seized, he may not complain of seizure despite the fact that the seizure was "directed at" him. Trustee in bankruptcy has authority to turn over books and records of corporation to government officials. Elbel v. U.S., 364 F.2d 127, 2 CLB No. 8, p. 357.

Florida Evidence is insufficient to support defendant's claim that he had standing to raise the illegality of a search of his accomplice's apartment where the only evidence was that he possessed a key to that apartment, had spent a night there, and that some of his property was present in the apartment. Ruiz v. State, 199 So.2d 478, 3 CLB 510-511.

Indiana Invited guest who slays host and leaves premises has no standing to object to search therein. Wilson v. State, 217 N.E.2d 147, 2 CLB No. 7, p. 53.

Kansas Mere passenger has no standing to complain of search of car. State v. Edwards, 415 P.2d 231, 2 CLB No. 7, p. 52.

Nevada Where defendant was legitimately on premises when police first entered and was thereafter removed to police station, the fact that he was not on premises when illegal search was actually made does not deprive him of standing to object. Harmless error rule applied to illegal search. Dean v. Fogliani, 407 P.2d 580, 2 CLB No. 1, p. 62.

Utah Defendant has no standing to complain about search of car which he had rented and which was long overdue where prior to the search he was arrested and

charged with larceny of the car. State v. Montalyne, 414 P.2d 985, 2 CLB No. 7, p. 56.

§21.10. The evidentiary hearing — Burden of proof

New York Appellate Division Appellate Division holds that burden of proof rests upon defendant in motion to suppress evidence seized as a result of warrantless search. People v. Loria, 24 A.D.2d 116, 2 CLB No. 1, p. 61.

New York Defendant who is alleged to have conspired with others to use their telephone in furtherance of bookmaking activity held to have standing to challenge validity of wiretap order. People have burden of proof to sustain validity of order. People v. McDonnell, 18 N.Y.2d 509, 3 CLB 72.

§21.20. The evidentiary hearing — Disclosure of informant's identity

United States Supreme Court Disclosure of confidential informant not constitutionally required where judge on motion to suppress has grounds for believing, by evidence submitted in open court and subject to cross-examination, that officer relied in good faith upon credible information supplied by a reliable informant. McCray v. Illinois, 386 U.S. 300, 3 CLB 169.

Illinois "We are compelled to hold that an informer who does participate in a crime . . . must be disclosed on a pretrial hearing on a motion to suppress, if other evidence does not establish probable cause, and failure to allow such a disclosure is error." The production of the information at the trial did not cure the error. People v. Wolfe, 219 N.E.2d 634, 2 CLB No. 9, p. 60.

New York Identity of confidential informant not required to be disclosed. People v. White, 16 N.Y.2d 270, 2 CLB No. 1, p. 61.

§21.30. The evidentiary hearing — Right to hearing on truth of allegations in supporting affidavits

New York Where defendant challenges only the credibility of the named informant and not that of the affiant (police officer), defendant is not entitled to factual hearing on motion to controvert the search warrant and suppress evidence. People v. Solimine, 18 N.Y.2d 477, 3 CLB 69.

§21.35. The evidentiary hearing — Hearing held in absence of defendant

New York The defendant's unexplained absence from a hearing on a motion to suppress requires reversal of the subsequent conviction. The conviction of his co-defendant with whom he was charged with acting in concert, must, in the interests of justice, also be reversed "since the evidence which was not suppressed may have been improperly before the jury" to his prejudice. People v. Anderson, 16 N.Y. 2d 282, 2 CLB No. 1, p. 62.

New York Supreme Court Exclusion of defendants from courtroom during hearing on motion to suppress deprives them of their right to a fair trial. People v. DeLuca, 265 N.Y.S.2d 668, 2 CLB No. 2, p. 47.

§21.40. Effect of pre-trial suppression order — in general

California Defendant may attack validity of search and seizure made pursuant to warrant at preliminary hearing or trial notwithstanding fact that he did not raise issue under Penal Code section pertaining to hearing before magistrate. People v. Butler, 415 P.2d 819, 2 CLB No. 8, p. 54.

Illinois Supreme Court of Illinois holds that order in pre-trial motion to suppress is binding on trial court in absence of newly discovered evidence and mandamus will lie to compel trial court to follow pre-trial order. People ex rel. MacMillian v. Napoli, 219 N.E.2d 489, 2 CLB No. 9, p. 60.

§21.45. Effect of pre-trial order to suppress — Duty of trial judge to reconsider where evidence differs at trial.

Court of Appeals, District of Columbia Where police officers' trial testimony dif-

fers from that given by them at pre-trial suppression hearing, trial judge is under a duty to consider the search and seizure issues *de novo*. Rouse v. United States, 359 F.2d 1014, 2 CLB No. 5, p. 41.

§22.00. Exclusion of evidence as fruit of the poisonous tree

Court of Appeals, 4th Cir. Where petitioner's arrest was merely hastened by reason of an illegal search, the evidence seized as incident to the arrest was not rendered inadmissible. Leek v. State of Maryland, 353 F.2d 526, 2 CLB No. 1, p. 43.

Louisiana Merchants' testimony that defendant had passed them worthless checks in exchange for certain merchandise was not the "fruit of the poisonous tree" simply because the merchants contacted the police only after reading a newspaper account of the illegal seizure of the merchandise in question in defendant's hotel room. State v. Jones, 201 So.2d 105, 3 CLB 583-84.

New Mexico Fingerprints taken from defendant following his arrest under an invalid arrest warrant may not be received in evidence against him at subsequent trial. State v. Miller, 412 P.2d 240, 2 CLB No. 5, pp. 15, 27.

North Carolina Wallet of robbery victim which the police located as the result of questioning the defendant in violation of *Miranda* v. *Arizona*, 384 U.S. 436, should have been excluded from the defendant's trial as the "fruit of the poisonous tree." State v. Mitchell, 155 S.E.2d 96, 3 CLB 584.

§22.10. Primary taint

California Where the defendant arrived at her apartment and discovered policemen conducting an illegal search, her admissions made to the police after she was shown the fruits of the search were inadmissible. They were the product of the illegal search and their connection with the search was not so attenuated as to dissipate the taint. People v. Faris, 407 P.2d 282, 47 Cal. Rptr. 370, 2 CLB No. 1, p. 62.

§22.50. Electronic eavesdropping — in general

United States Supreme Court New York eavesdropping statute held unconstitutional on its face. Berger v. New York, 388 U.S. 41, 3 CLB 310.

United States Supreme Court Supreme Court orders new trial for defendant convicted of tax evasion where apparently unrelated F.B.I. bugging of his hotel room was conducted during the preparation of tax evasion prosecution. Black v. United States, 385 U.S. 26, 2 CLB No. 10, p. 33.

Court of Appeals, 7th Cir. The telephone dial impulses recorded by a pen register held to be "communications" within the meaning of Section 605 of the Federal Communications Act. U.S. v. Dote, U.S. v. Guglielmo, 371 F.2d 176, 3 CLB 43.

Court of Appeals, 9th Cir. Extensive trespassory electronic bugging does not, *ipso facto*, requires a dismissal of the prosecution where there is no connection between the surveillance and the indictment and trial. Battaglia, Jr. v. United States, 383 F.2d 303, 3 CLB 637.

Florida Testimony by witness as to conversation heard on radio receiver where sending receiver was secreted in undercover agent's purse held inadmissible as violative of the defendant's right to privacy. Hadju v. State, 189 So.2d 230, 2 CLB No. 9, p. 46.

Illinois Statute making it a crime to record conversation "without the consent of any party thereto" allows non-consenting party to bar use of recording against himself. People v. Kurth, 216 N.E.2d 154, 2 CLB No. 6, p. 48.

§22.60. Electronic eavesdropping — Recording devices

United States Supreme Court Use at trial of defendant's bribe attempt of juror as recorded by recording device secreted pursuant to court order upon defendant's supposed co-conspirator who was in fact working with the F.B.I. held not to be a violation of defendant's Fourth Amendment rights. Osborn v. United States, 385 U.S. 323, 3 CLB 31, 35 LW 4067.

Court of Appeals, 9th Cir. Action of telephone company in monitoring and recording all incoming and outgoing calls on defendant's telephone for a period of three months was unreasonable and required suppression of tapes which disclosed gambling activity during first three days of monitoring, where telephone company's sole purpose in monitoring was to determine whether defendant was circumventing the company's automatic record keeping equipment and by third day, it was clear that he was. Bubis v. United States, 384 F.2d 643, 3 CLB 643-44.

§22.62. Electronic eavesdropping — Procedure for suppressing fruits of eavesdropping

New York Where counsel is unable to apply to issuing judge prior to trial to vacate wiretap order, he may object to introduction of evidence at trial. Trial judge should consider issue on the merits. Conclusory affidavits held insufficient to support wiretap order. Judgment reversed and new trial ordered. People v. McCall, 17 N.Y.2d 152, 2 CLB No. 4, p. 59.

§22.80. Failure to make motion to suppress as waiver

Missouri Defense counsel's failure to make motion to suppress illegally seized evidence in advance of trial constitutes a waiver of any such objection. State v. Holt, 415 S.W.2d 761, 3 CLB 586.

New Jersey Defense counsel's failure to make motion to suppress illegally obtained evidence within the statutory 30 day period is deemed a waiver of such claim where he fails to establish good cause for failure to do so. State v. Raymond, 230 A.2d 404, 3 CLB 511.

§22.90. Failure to object to evidence at trial as waiver

Missouri Defense counsel's failure to object at trial to the admissibility of certain evidence on Fourth Amendment grounds constitutes a waiver of his right to raise the claim on appeal despite the fact that he had brought a pre-trial motion to suppress. State v. Simone, 416 S.W.2d 96, 3 CLB 586.

§23.00. Silence as an admission

California It was a violation of defendant's privilege against self-incrimination for trial court to allow testimony that defendant, when accused by the police of the crime, stated that he would say nothing on the advice of his attorney. People v. Ridley, 408 P.2d 124, 2 CLB No. 1, p. 62.

Florida Arresting officer's testimony that defendant didn't say anything when identified by victim violated the rule announced in *Miranda* that prosecution may not use at trial the fact that the accused "stood mute in the face of accusation." Jones v. State, 200 So.2d 574, 3 CLB 587.

Massachusetts Court holds that giving of instruction on admissions by silence where defendant was represented by counsel at time he was "at liberty" to answer accusation is sufficiently prejudicial to require reversal even though no objection or exception was taken by defense counsel at trial. Commonwealth v. Freeman, 227 N.E.2d 3, 3 CLB 503.

New York Appellate Division Conviction reversed where detective was permitted to testify that defendant did not deny accusations of accomplice in police station and where court repeated that testimony in its charge. People v. DeRuggiero, 264 N.Y.S.2d 778, 2 CLB No. 1, p. 45.

Pennsylvania Neither trial court's comment that acquittal would be miscarriage of justice, nor testimony that petitioner, while in custody, remained silent while incriminating statements were being made by co-defendant was sufficient ground for habeas corpus relief. Commonwealth ex rel. Smith v. Rundle, 223 A.2d 88, 2 CLB No. 10, p. 54.

Pennsylvania Exclusionary rule with respect to tacit admissions not to be applied retroactively. Introduction of accusation of another for purpose of showing tacit admission by accused's failure to reply did not violate accused's right to confront and cross-examine his accusers. Commonwealth ex rel. Staino v. Cavell, 228 A.2d 647, 3 CLB 344.

§23.10. Blood samples

United States Supreme Court Taking of blood sample and introduction of chemical analysis held not to violate Fourth or Fifth Amendment rights. Schmerber v. California, 384 U.S. 757, 2 CLB No. 6, p. 29.

New Jersey Compelling a defendant to submit to a blood test and a voice identification test pursuant to court order does not violate due process or privilege against self-incrimination. State v. Cary, 230 A.2d 384, 3 CLB 512.

§23.20. Fingerprints

Arizona Defendant's fingerprints obtained against her will may be used as evidence at trial. Privilege against self-incrimination held not violated. State v. Stelzriede, 420 P.2d 170, 3 CLB 63.

Oklahoma The taking of the defendant's fingerprints and their introduction in evidence to identify him as the perpetrator of the crime did not violate his privilege against self-incrimination. Lester v. State, 416 P.2d 52, 2 CLB No. 8, p. 49.

§23.30. Handwriting specimens

United States Supreme Court The taking of handwriting samples in the absence of counsel did not violate petitioner's Fifth or Sixth Amendment rights. Gilbert v. California, 388 U.S. 263, 3 CLB 322.

California *Escobedo* held inapplicable to a request for handwriting samples four days after accused was taken into custody. People v. Graves, 411 P.2d 114, 2 CLB No. 4, p. 54.

New Mexico The privilege against self-incrimination is not violated when a prisoner is persuaded by a jailer to write a letter to his wife which is then used as a handwriting exemplar in a forgery prosecution against him. State v. Hudman, 431 P.2d 748, 3 CLB 658.

Oregon The introduction of handwriting samples taken from the accused without first warning him of right to counsel held not to be a violation of his Fifth or Sixth Amendment rights. State v. Fisher, 410 P.2d 216, 2 CLB No. 3, p. 62.

§23.80. Right of defendant to refuse to submit to examination by state psychiatrist where defense is insanity

Illinois Privilege against self-incrimination does not extend to refusal to submit to psychiatric examination, only to refusal to answer incriminating questions. People v. Wax, 220 N.E.2d 600, 3 CLB 56.

§23.85. Testimony before grand jury pursuant to subpoena

New York Supreme Court Where the defendant was found to have been a target of the investigation, was subpoenaed to testify before the grand jury, and neither claimed nor waived his privilege against self-incrimination, his grand jury testimony could not thereafter be used as a basis for a perjury prosecution. People v. Tomasello, 264 N.Y.S.2d 686, 2 CLB No. 1, p. 62.

§23.90. Statutory reporting requirements

United States Supreme Court Petitioner is not entitled to dismissal of tax evasion prosecution simply because he was compelled to file incriminating statements in tax court proceeding in which he contested proposed deficiencies.

Petitioner's remedy "at most" is to suppress the use of the statements during the criminal trial. U.S. v. Blue, 384 U.S. 251, 2 CLB No. 6, p. 29.

§23.92. Basis for asserting privilege

Court of Appeals, 3rd Cir. Trial court may not condition acceptance of witness' assertion of privilege on *in camera* statement of attorney setting forth basis of claim. In re U.S. Hoffman Can Corp. v. Hirsch, 373 F.2d 622, 3 CLB 142, 180.

§23.95. Registration requirement

Court of Appeals, 5th Cir. Where the indictment alleges and the government is thereby required to prove not merely that firearm in question "had not been registered" but that it "had not been registered by the defendant," the prosecution of defendant under 26 U.S.C. 585, which makes it a crime "for any person to re-

ceive or possess a firearm . . . which has not been registered [with the Secretary of the Treasury] as required by Section 5841" is an unconstitutional violation of his privilege against self-incrimination. Lovelace v. United States, 357 F.2d 306, 2 CLB No. 3, p. 52.

Court of Appeals, 5th Cir. The provision of 21 U.S.C. 176(a) which makes it a crime to bring marijuana into the United States without invoicing it or declaring it at the border does not violate the Fifth Amendment privilege against self-incrimination. Rule v. United States, 362 F.2d 215, 2 CLB No. 6, p. 42.

§23.98. Retroactivity of constitutional rulings

United States Supreme Court Griffin v. California, 380 U.S. 609, which prohibited as a violation of due process comment by state judge or prosecutor on defendant's failure to testify, is not retroactive. Tehan v. Shott, 382 U.S. 406, 2 CLB No. 2, p. 32.

§24.00. Length of delay

Court of Appeals, 4th Cir. Where "defective delinquency" proceedings were commenced against defendant prior to expiration of his prison sentence, his confinement by state for eighty days after expiration of his sentence and prior to formal defective delinquent adjudication did not constitute a violation of due process. Daugherty v. State of Maryland, 355 F.2d 803, 2 CLB No. 2, p. 35.

Arizona Affidavit of petitioner's attorney which listed the activities of each part of the Superior (trial) court demonstrated that criminal case could have been tried within 60 days limit. Supreme Court grants permanent writ of prohibition. Norton v. Superior Court, 411 P.2d 170, 2 CLB No. 4, p. 58.

California Where federal prisoners repeatedly requested trial on state charges and federal authorities indicated willingness to assist in bringing prisoners to state trial, prosecutor's delay of 18 years was a deprivation of constitutional right to speedy trial. Prosecutor's letter to petitioner's attorney in which he stated that "As far as I am concerned (they) can sit and rot in prison for the rest of their lives," compels the conclusion that the delay was "purposeful or oppressive." *Pollard* v. *United States,* 352 U.S. 359. Barker v. Municipal Court, 415 P.2d 809, 2 CLB No. 8, p. 56.

Tennessee The defendant's constitutional right to a speedy trial was violated where there was more than a two year delay between indictment and trial. Wright v. State, 405 S.W.2d 177, 2 CLB No. 9, p. 57.

§24.05. Computation of delay

Idaho "[T]he time within which an accused is to be secured in his right to a speedy trial must be computed from the time the complaint is filed against him . . . when the accused is incarcerated within the jurisdiction of this state and his whereabouts are known to the prosecuting authorities. When the whereabouts of the accused are unknown, the time should be considered at least from the time the prosecuting authorities obtain knowledge of the accused's whereabouts, when he is within the jurisdiction of this state, whether incarcerated or not." Jacobson v. Winter, 415 P.2d 297, 2 CLB No. 8, p. 56.

§24.10. Duty of prosecutor to obtain defendant from another jurisdiction

Court of Appeals, 4th Cir. Fourth Circuit lays down criteria for measuring reasonableness of prosecutor's delay in bringing to trial defendant incarcerated in another jurisdiction. U. S. v. Banks, 370 F.2d 141, 3 CLB 45.

Florida Florida prosecutors warned that failure to seek extradition of prisoners held in foreign jurisdictions for trial in Florida may vitiate convictions on speedy trial grounds. Dickey v. Circuit Court, 200 So.2d 521, 3 CLB 588.

Kentucky Lower court's denial of a motion for a speedy trial by a defendant imprisoned in a federal penitentiary was proper "since under the circumstances he was not entitled to demand a trial on the

state indictment." Ruiz v. Kentucky, 415 S.W.2d 372, 3 CLB 510.

Oklahoma Out of state prisoner under indictment in Oklahoma may not have speedy trial unless he pays traveling expense. Dodd v. County Attorney, 416 P.2d 181, 2 CLB No. 8, p. 55.

§24.20. Demand for speedy trial as prerequisite to motion to dismiss

Arizona A defendant who claims he is being denied a speedy trial must make a motion on this ground when he is "brought to trial." Where the delay was caused by incarceration in another state, "brought to trial" means the first day he appears in court after his return. State v. Cuzick, 428 P.2d 443, 3 CLB 514-15.

Ohio Accused has a constitutional right to a speedy trial. However, to assert that right he must make a demand upon the court for a speedy trial. Neither a detainer filed with penal institution, correspondence with prosecuting attorney, nor letter of inquiry to Clerk of court constitutes the requisite affirmative demand. State v. Doyle, 228 N.E.2d 863, 3 CLB 588.

§24.25. Delay in instituting prosecution

Court of Appeals, District of Columbia Where defendant is unable to remember his whereabouts on two days on which he is alleged to have made sales of narcotics and where the authorities can give no good reason justifying the 2 month delay between the issuance and execution of the warrant for defendant's arrest, the charges are ordered dismissed. Godfrey v. United States, 358 F.2d 850, 2 CLB No. 3, p. 46.

§24.40. Waiver of right

Maryland Defendant's filing of motions for discovery made three months after a motion to dismiss the indictment for violation of his right to a speedy trial constitutes a waiver of his right to a speedy trial. State v. Long, 230 A.2d 119, 3 CLB 515.

Oklahoma Defendant is held to have waived right to a speedy trial by failing to object to one year delay between filing of charges and appointment of counsel. Bell v. State, 430 P.2d 841, 3 CLB 583.

§24.50. Right to reprosecute following dismissal

Court of Appeals, 9th Cir. Dismissal of indictment pursuant to Rule 48(b) of the Federal Rules of Criminal Procedure because of the government's delay in bringing defendant to trial is not with prejudice and does not bar re-indictment. Cohen v. United States, 366 F.2d 363, 2 CLB No. 9, p. 38.

§24.55. Applicability of federal constitutional provision to states

United States Supreme Court Sixth Amendment right to speedy trial incorporated within Fourteenth Amendment's due process clause, Klopfer v. North Carolina, 386 U.S. 213, 3 CLB 170.

§25.00. Right to counsel

United States Supreme Court Where a post-indictment lineup was conducted in the absence of the defendant's counsel, the out-of-court identification testimony would be excluded on the ground that the defendant's right to counsel had been violated. The courtroom identification must be excluded as well unless the government is able to establish by clear and convincing evidence that the courtroom identification was not based on the improper lineup identification. U.S. v. Wade, 388 U.S. 218, 3 CLB 316.

United States Supreme Court Direct testimony as to lineup identification in absence of counsel requires reversal unless harmless error is established. Gilbert v. California, 388 U.S. 263, 3 CLB 322.

§25.10. Due process

Court of Appeals, 4th Cir. Procedure which destroys possibility of objective impartial identification violates due process and bars use of the identification at trial. Palmer v. Peyton, 359 F.2d 199, 2 CLB No. 5, p. 33.

Court of Appeals, 8th Cir. Witness' view of defendants in jail without a lineup does not disqualify them from testifying at sub-

sequent trial. Mechanics of the view may influence the weight, but not the admissibility of identification. Golliher v. United States, 362 F.2d 594, 2 CLB No. 7, p. 32.

§25.30. Prior identification as affecting testimony

Court of Appeals, 7th Cir. Identification witnesses were properly permitted to testify even though they had first identified the defendants from mug shots taken after an illegal arrest. Trial court's finding, following hearing outside jury's presence, that courtroom identification was not significantly affected by the photographs satisfied due process requirements. United States v. Hoffman et al., 385 F.2d 375, 3 CLB 638-39.

§25.35. Retroactivity of constitutional rulings

United States Supreme Court Newly established right to counsel at pretrial lineup is not to be accorded retroactive effect. But Court will look to circumstances of the lineup to determine whether procedure used was so suggestive or unfair that it violated due process of law. Where accused was brought before the critically injured victim who was the only remaining eye-witness, due process of law was not violated. Stovall v. Denno, 388 U.S. 293, 3 CLB 316.

New Jersey Supreme Court of New Jersey refuses to decide whether recent United States Supreme Court cases dealing with right to counsel at lineups in a post-indictment situation apply to a lineup conducted prior to the indictment; the court notes that since those cases need not be applied retroactively to identifications prior to June 12, 1967, it need not decide the issue, since the lineup in its case occurred prior to that date. State v. Sinclair, 231 A.2d 565, 3 CLB 655.

§30.00. Arrest

Minnesota Supreme Court of Minnesota holds that Fourth Amendment prohibits the issuance of arrest warrants by court clerks not only in connection with felony prosecutions but also with respect to prosecutions under municipal ordinances. State v. Paulick, 151 N.W.2d 591, 3 CLB 570.

Wisconsin Statute which permitted District Attorney to issue arrest warrant in paternity complaint was violative of the Fourth Amendment to the U.S. Constitution. State v. Simpson, 137 N.W.2d 391, 2 CLB No. 2, p. 57.

§30.10. Immunity from arrest

New York Criminal Court Where the defendant came from Louisiana to New York at the request of the United States Attorney for the sole purpose of testifying in Federal Bankruptcy Court corporate reorganization proceedings, he was in the state voluntarily and therefore immune from service of an outstanding arrest warrant on state misdemeanor charges even though the U.S. Attorney could have served him with a subpoena in Louisiana and did, in fact, serve him with a subpoena after his arrival. People v. Bloomsteil, 265 N.Y.S.2d 877, 2 CLB No. 2, p. 46.

§32.75. Right to bail — Justification of sureties, etc.

Court of Appeals, 2nd Cir. District Court has discretion to delay admitting a defendant to bail for the purpose of holding a hearing as to the adequacy of the bail even where the Court has called for $100,000 cash bail and the defendant posts that exact sum. United States v. Nebbia, 357 F.2d 303, 2 CLB No. 4, p. 32.

§32.80. Right to bail — Procedures under Federal Bail Reform Act

Court of Appeals, District of Columbia Under the Federal Bail Reform Act of 1966, a federal defendant detained on a felony charge prior to indictment who after 24 hours is unable to satisfy the conditions of pretrial release imposed by the committing magistrate (18 U.S.C. 3146(d)) must first seek review of the conditions by the committing magistrate (the "judicial officer" who imposed them) before requesting amendment of them in the District Court pursuant to 18 U.S.C. 3147. Shackelford v. U. S., 383 F.2d 212, 3 CLB 484.

§33.00. The preliminary hearing

California Although probable cause to hold the defendant had already been established at preliminary hearing, it was error for hearing court to restrict the scope of defense counsel's cross-examination of the state's witnesses and to prevent defendant from calling a witness for the purpose of establishing an affirmative defense. Jennings v. Superior Court of Contra Costa County, 428 P.2d 304, 3 CLB 508.

§33.60. Grand jury proceedings

New York Appellate Division Defendant may not refuse to testify before grand jury on ground that to give testimony harmful to others will violate her religious beliefs. People v. Woodruff, 26 A.D.2d 236, 2 CLB No. 8, p. 57.

§33.65. Grand jury proceedings — Constitutional right to be prosecuted by indictment only

Washington Recent United States Supreme Court decisions have not changed the rule of *Hurtado* v. *California* that the Fifth Amendment guarantee of grand jury indictment for infamous crimes is not a necessary element of due process. State v. Kanistanaux, 414 P.2d 784, 2 CLB No. 6, p. 47.

§33.70. Grand jury proceedings — Subpoenas

Court of Appeals, 6th Cir. Taxpayer has right to intevene in action by Government to enforce subpoena ordering taxpayer's bank to turn over records of transactions between taxpayer and bank. Court finds (1) representation of taxpayer's interest may be inadequate; (2) taxpayer may be bound by judgment; and (3) unless permitted to intervene taxpayer would not be an aggrieved party entitled to appeal. Justice v. U.S. v. First National Bank of Pikeville, 365 F.2d 312, 2 CLB No. 8, p. 38.

Florida The District Court of Florida rules in a case of first impression in that jurisdiction that the issuance of a subpoena to testify before a "grand jury" whose members had been drawn and summoned, but not yet impaneled, did not violate any of petitioner's rights. Court rejects argument that grand jury was not legally in existence, and that therefore the subpoenas were a nullity. State ex rel. Martin v. Florida, 188 So.2d 684, 2 CLB No. 8, p. 49.

Florida The fact that the state attorney has a subpoena sent out when there is no grand jury impaneled or sworn does not provide the basis for a motion to quash the subpoena. State v. Mitchell, 188 So.2d 684, 2 CLB No. 9, p. 48.

§33.75. Grand jury proceedings — Persons entitled to testify

Court of Appeals, 5th Cir. Georgia statute permitting public officials to testify before Grand Jury when charged with malfeasance in office, does not violate right to equal protection of non-public official charged with robbery who may not testify before Grand Jury. Sweeney v. Balkcom, 358 F.2d 415, 2 CLB No. 4, p. 36.

§34.20. Motions addressed to the indictment or information — Sufficiency of indictment

Court of Appeals, 5th Cir. Indictment which charges an attempt to derail "trains" but does not allege which trains or the location of the attempted derailment held insufficient. Davis v. United States, 357 F.2d 438, 2 CLB No. 3, p. 47.

Illinois An information was sufficient where it stated only "that on January 15, 1964, the defendant 'at and within the County of Adams, in the State of Illinois' did commit armed robbery." People v. Blanchett, 212 N.E.2d 97, 2 CLB No. 1, p. 56.

Missouri Indictment which charged unlawful sale of marijuana was not required to contain allegation of guilty knowledge. State v. Page, 395 S.W.2d 146, 2 CLB No. 1, p. 56.

New York Indictment for grand larceny dismissed where People's theory was that the defendants (officers of an engineering firm hired by the State to supervise construction of a highway) had aided and abetted a contracting company in exag-

gerating the amount of work done for the State and there was no evidence that defendants knew that the work had not been done. The filing of false affidavits that they had personally inspected the work could not be the basis for a charge of grand larceny. People v. Yonkers Contracting Co., 17 N.Y.2d 322, 2 CLB No. 5, p. 49.

North Carolina Indictment which charged that defendant broke and entered:

"a certain building occupied by one Chatham County Board of Education, a government corporation," was defective. It neither identified the premises with sufficient certainty to enable the defendant to prepare a defense nor offered protection from another prosecution for the same offense. State v. Smith, 148 S.E.2d 844, 2 CLB No. 8, p. 49.

§34.25. Motions addressed to the indictment or information — Sufficiency and legality of evidence before grand jury

Court of Appeals, District of Columbia Use of illegally obtained evidence before federal grand jury does not normally invalidate indictment where there is sufficient other competent evidence. Laughlin v. United States, 385 F.2d 287, 3 CLB 487.

Court of Appeals, 2nd Cir. Federal prosecutor need not tell grand jury that testimony being presented to it is hearsay. United States v. Payton, 363 F.2d 996, 2 CLB No. 7, p. 36.

Court of Appeals, 8th Cir. Use of illegally seized evidence before grand jury does not render indictment defective. West v. U.S., 359 F.2d 50, 2 CLB No. 5, p. 36.

§34.30. Motions addressed to the indictment or information — Bill of particulars

New York County Court Where defendant is charged with two separate acts of forcible rape, where both females are over the age of fifteen and where his defense is alibi, a bill of particulars furnished by the District Attorney stating that the first rape occurred between July 1 and August 26, 1964 and the second between September 1 and December 31, 1964 is insufficient. Defendant is entitled to exact dates on which the prosecutor will claim the rapes occurred. People v. Britt, 48 Misc.2d 705, 265 N.Y.S.2d 368, 2 CLB No. 2, p. 46.

§34.35. Motions addressed to the indictment or information — Effect of bill of particulars on proof at trial

Florida The prosecution's erroneous statement in its bill of particulars that the gun found at the scene of a robbery belonged to the victim did not deprive the defendant of a fair trial where the proof of guilt was otherwise sufficient and the gun's ownership was not a material issue. Smith v. State, 199 So.2d 503, 3 CLB 497.

Maine Where indictment fails to specify the time of the alleged crime but bill of particulars demanded by the defendant does, state's proof is thereby limited to that date, and state must establish that date as the date of the crime beyond a reasonable doubt. State v. Littlefield, 219 A.2d 755, 2 CLB No. 7, p. 42.

§35.10. Discovery — Statements of the defendant

Illinois Where confession is introduced in evidence and prosecutor has failed to comply with state statute requiring that written copy of confession and names and addresses of all persons present at time confession was made be furnished defense counsel prior to trial, conviction must be reversed where the case is close or where absent the confession, the evidence is insufficient. People v. Barfield, 213 N.E.2d 24, 2 CLB No. 2, p. 54.

§35.15. Discovery — Statements of witnesses

Illinois Trial court may not, even as a matter of discretion, direct prosecutor to allow defense pre-trial discovery of witness' statements. People v. Hall, 227 N.E. 2d 773, 3 CLB 576.

Oregon Prior statements of witnesses must be turned over to counsel at trial

of case for purposes of cross-examination. Pre-trial discovery of those statements properly denied. State v. Foster, 407 P.2d 90, 2 CLB No. 1, p. 52.

Washington It was not error for the trial court to refuse to order the prosecutor to turn over to defense counsel the statements of all witnesses and the names of all persons who were present at the scene of the crime. Nor was it error to deny the indigent defendant's request for a transcript of the co-defendant's trial. State v. Peele et al., 410 P.2d 599, 2 CLB No. 3, p. 57.

§35.20. Discovery – Identity of witnesses

Illinois Where defendant fails to avail himself of statutory machinery to obtain names and addresses of state's witnesses in advance of trial, he cannot complain where state listed only two witnesses on back of indictment but called nine witnesses at the trial. He was not entitled to anticipate that no other witnesses would be called. People v. Williams, 229 N.E.2d 158, 3 CLB 650.

§35.40. Discovery – Alleged contraband

Court of Appeals, 5th Cir. Defendant's inability to obtain pre-trial inspection of alleged narcotics on retrial of his case because narcotics had been destroyed by government did not warrant dismissal of indictment where no motion for inspection was made at first trial. Blanchard v. United States, 360 F.2d 318, 2 CLB No. 6, pp. 15, 28.

§35.50. Discovery – Records, films, tape recordings, etc.

Iowa Defendant entitled to production of tape recordings of police radio calls made at time of his arrest in order to discover any possible evidence substantiating his claim to entrapment. State v. White, 151 N.W.2d 552, 3 CLB 502.

Louisiana Motion picture of defendant in act of committing the crime held not subject to pre-trial discovery. State v. Dickson, 180 So.2d 403, 2 CLB No. 1, p. 52.

Wisconsin No rule of discovery requires state to turn over to defense all records it may have concerning mental condition of witness. State v. Miller, 151 N.W.2d 157, 3 CLB 515.

§35.55. Discovery – Defense counsel's right to interview prosecution's witnesses

Court of Appeals, District of Columbia Prosecutor's advice to certain prospective witnesses that they not speak to anyone about the case unless he was present held an improper and unreasonable interference with the defendant's equal right to interview witnesses. Gregory v. United States, 369 F.2d 185, 2 CLB No. 8, pp. 20, 27.

§36.00. Severance

Court of Appeals, District of Columbia Denial of defense counsel's motion for a severance made at the start of trial on the ground that it "comes too late" held an inadequate reason where one of the crimes charged is a capital offense. Gregory v. United States, 369 F.2d 185, 2 CLB No. 8, pp. 20, 27.

Court of Appeals, 5th Cir. Trial court's failure to grant defendant a severance after a co-defendant called to the witness stand in the absence of the jury asserted his privilege against self-incrimination was not an abuse of discretion where there was no showing that either the co-defendant's version would be exculpatory or that he would be more likely to testify if tried separately. Smith v. United States, 385 F.2d 34, 3 CLB 695, 707.

Court of Appeals, 7th Cir. Where defendant and co-defendant were both represented by same counsel, defendant's failure to move for severance on the basis of misjoinder at trial did not prevent him from raising the issue on appeal. United States v. Gougis, 374 F.2d 758, 3 CLB 244, 257.

California It was prejudicial error to deny defendant's motion for a separate trial, even though his co-defendant subsequently entered a plea of guilty before trial.

People v. Massie, 428 P.2d 869, 3 CLB 514.

New York Where redaction of confession in order to minimize prejudice against non-confessing defendant prejudiced the declarant, the failure to grant a severance was error. People v. LaBelle, 18 N.Y.2d 405, 3 CLB 70.

Ohio Trial Court's refusal to sever indictment charging defendant with forgery and unrelated crime of possession of a concealed weapon held reversible error. State v. Atkinson, 211 N.E.2d 665, 2 CLB No. 1, p. 56.

Wisconsin Motion to sever must contain facts which show specific prejudice that will result from joint trial. Jung v. State, 145 N.W.2d 684, 3 CLB 54.

§36.10. Change of venue

Court of Appeals, 5th Cir. Fifth Circuit holds that state must afford misdemeanor defendant opportunity to establish community prejudice and thereby obtain change of venue even where *voir dire* of jury discloses no "actual" bias. Pamplin v. Mason, 364 F.2d 1, 2 CLB No. 8, p. 34.

Kentucky Where the defendant, moving for a change of venue, submitted (1) affidavits alleging prejudice and (2) inflammatory newspaper articles in support of the motion, and where the Commonwealth failed to respond, the trial judge should have granted the motion. The submission of opposing affidavits after conviction was insufficient. Brunner v. Commonwealth, 395 S.W.2d 382, 2 CLB No. 1, p. 64.

Texas Texas Court of Criminal Appeals reverses the conviction of the late Jack Ruby for the murder of Lee Harvey Oswald on the ground that it was reversible error not to grant defendant's motion for change of venue based upon prejudicial pre-trial publicity, and also because an oral confession of premeditation which Ruby made while in police custody and which was introduced in evidence at the trial had been obtained in violation of Texas "warning" statute. Rubenstein v. State, 407 S.W.2d 793, 3 CLB 63.

§36.25. Motions by indigent defendant — Free transcript of preliminary hearing or prior trial

Court of Appeals, District of Columbia Trial court's refusal to provide indigent defendant with a free transcript of his preliminary hearing was erroneous but did not require reversal where government's evidence at the trial was overwhelming. Boney v. United States, 387 F.2d 237, 3 CLB 559.

New York Supreme Court Indigent defendant under indictment and awaiting trial does not have a constitutional right to a free transcript of the testimony at the preliminary hearing. People v. Robinson, 265 N.Y.S.2d 722, 2 CLB No. 2, p. 51.

§36.30. Motions by indigent defendant — Issuance and service of subpoenas without payment of fees

Court of Appeals, 10th Cir. Indigent defendant with long history of mental disturbance who asserts an insanity defense at his federal prosecution for converting government property is not entitled to have subpoenas issued pursuant to Rule 17(b), F.R. Cr.P. to any of the out of state doctors who have examined him in the past where their written reports are available at trial and the defendant is examined pre-trial by two local psychiatrists one of whom is selected by defense counsel. Findley v. United States, 380 F.2d 752, 3 CLB 487-88.

§37.00. Plea bargaining

Court of Appeals, District of Columbia Due process and equal protection are not denied when a prosecutor permits A to plead guilty to a lesser offense but refuses to permit his co-defendant B to do so. Newman v. United States, 382 F.2d 479, 3 CLB 489.

Court of Appeals, 5th Cir. Fifth Cir. cuit rules that plea discussions and plea agreements between an accused and a prosecutor are consistent with fair administration of justice. However court agrees with committee of ABA Project of Minimum Standards for Criminal Justice that

the "trial judge should not participate in plea discussions." Brown v. Beto, 377 F.2d 950, 3 CLB 329.

Pennsylvania "Plea bargaining" held not unconstitutional. Commonwealth ex rel. Kerekes v. Maroney, 223 A.2d 699, 3 CLB 53.

§37.02. Plea to charge not contained in indictment

Iowa ". . . [T]he practice of accepting a plea to a charge other than that contained or included in the country attorney's information or Grand Jury indictment, without the filing of a formal charge of the crime to which the plea is accepted, is not to be commended." State v. Dombroske, 138 N.W.2d 49, 2 CLB No. 1, p. 58.

§37.20. Procedure to be followed by trial judge in determining whether plea should be accepted – Duty to advise defendent of possible sentence

Montana Before accepting guilty plea trial judge must inform defendant of maximum penalty which may be imposed. State ex rel. Beibinger v. Ellsworth, 415 P.2d 728, 2 CLB No. 8, p. 55.

§37.30. Procedure to be followed by trial judge in determining whether plea should be accepted – Duty to inquire as to voluntariness of plea

Court of Appeals, 6th Cir. It is not a violation of due process for state trial judge to accept guilty pleas without making inquiry as to voluntariness. Waddy v. Heer, 383 F.2d 789, 3 CLB 638.

§37.40. Procedure to be followed by trial judge in determining whether plea should be accepted – Ritualistic formula not necessary

Maryland "That the defendant is aware of the nature of the charges and of the consequences of a guilty plea is the duty of the court to ascertain, but the court need not follow any ritualistic formula in reaching its determination. While it might have been the better practice for the trial judge to put the accused on notice of his rights officially, in open court, it was sufficient under the circumstances of this case for the accused to be made aware of those rights through his own lawyer." Owens v. State, 222 A.2d 838, 2 CLB No. 10, p. 53.

§37.45. Procedure to be followed by trial judge in determining whether plea should be accepted – Duty to record pre-plea inquiry

Michigan "This Court has no reason to doubt that the trial judge advised defendant of the consequences of his plea, but the record is inadequate in this regard. Such advice is not recorded and was apparently given at the unrecorded conference in chambers. To avoid such inadequacies, trial courts should record all of the proceedings, whether in court or in conference or in chambers." People v. Johnson, 139 N.W.2d 137, 2 CLB No. 2, p. 54.

§37.50. Involuntariness of plea – Threats

Court of Appeals, 4th Cir. Statements by trial court to defendant that "case develops to be an open and shut" and that ". . . if you would go through the full row and be prosecuted now . . . then you would never be free from confinement" render subsequent guilty plea involuntary. United States v. Schmidt, 376 F.2d 751, 3 CLB 329.

§37.54. Involuntariness of plea – Promises

Court of Appeals, 5th Cir. Defendants' pleas of guilty induced by prosecutor's promise that he would not seek the death penalty held not involuntary. Voluntary plea of guilty held a waiver of all prior non-jurisdictional defects. Busby v. Holman, 356 F.2d 75; Cooper v. Holman, 356 F.2d 82, 2 CLB No. 2, p. 39.

Court of Appeals, 6th Cir. Although Sixth Circuit agrees that plea of guilty induced by judge's promise of lesser penalty is improper, court upholds guilty plea entered in reliance upon judge's agreement to recommend to jury (which im-

poses sentence under Tennessee law) sentence agreed upon between prosecutor and defense counsel. Waddy v. Heer, 383 F.2d 789, 3 CLB 638.

District Court (N.Y.) A guilty plea induced by a trial judge's sentence promise held inherently involuntary. Where trial judge refuses to adhere to sentence promise which induced guilty plea, he must, on his own motion, reinstate original plea of not guilty. United States ex rel. Elksnis v. Gilligan, 256 F.Supp. 244, 2 CLB No. 6, p. 32.

New York Where defendant waives counsel and pleads guilty in reliance upon prosecutor's representation that he will recommend a "time served" sentence, prosecutor's failure to make such recommendation entitles defendant to withdraw his guilty plea. People v. Prentice, 24 A.D.2d 916, 2 CLB No. 1, p. 58.

Washington Prosecutor's failure to carry out promise of sentence recommendation cannot be cured at a later date by bringing the defendant back and recommending resentence. Darnell v. Timpani, 414 P.2d 782, 2 CLB No. 7, p. 59.

§37.56. Involuntariness of plea — Court's failure to advise defendant of consequences of plea

Court of Appeals, 5th Cir. Failure to advise defendant that offense to which he is pleading guilty is one for which he will be ineligible for parole does not render plea involuntary. Ineligibility for parole is not a "consequence of the plea" about which a defendant must be informed. Trujillo v. United States, 377 F.2d 266, 3 CLB 328-29.

Court of Appeals, 7th Cir. Trial court's failure to advise defendant charged with "enticing a child for criminal purposes" of his eligibility for commitment as a sexual deviate for a period of time longer than the maximum prison term held not to invalidate his waiver of counsel and plea of guilty. Butler v. Burke, 360 F.2d 118, 2 CLB No. 5, p. 40.

Illinois Judgments reversed where defendant, who pleaded guilty to five indictments charging armed robbery and two indictments charging rape, and who received an aggregate sentence of five to forty years in prison had not been first apprised of the "punishment fixed by law." Supreme Court Rule 26 requires the court to explain to a defendant, before pleading, the "consequences" of a plea. The court did not comply by merely informing defendant that he could be sentenced to "more than one year" in each case. People v. Mackey, 211 N.E.2d 706, 2 CLB No. 1, p. 58.

Michigan Where unrepresented defendant charged with escape is not informed prior to guilty plea that sentence for escape will not commence until after service of first sentence, plea is not voluntarily made with understanding of the consequences and must be vacated. People v. Cairns, 145 N.W.2d 345, 2 CLB No. 10, p. 54.

Michigan Court's failure to explain, at defendant's request, the maximum possible sentence rendered the guilty plea involuntary. People v. Leach, 141 N.W.2d 377, 2 CLB No. 5, p. 50.

Ohio It was not error to require defendant to plead prior to advising him of his rights. Knauf v. Koloski, 212 N.E.2d 603, 2 CLB No. 2, p. 53.

Texas Failure of trial court to advise defendant that his plea of guilty to the crime of premeditated murder could result in the death sentence requires a reversal of his conviction and sentence of death where the jury, called upon to consider the sentence, imposed the death sentence. Williams v. State, 415 S.W.2d 917, 3 CLB 580.

§37.70. Motion to withdraw or set aside guilty plea — Prior to the imposition of sentence

Court of Appeals, 5th Cir. It is an abuse of discretion to refuse to permit defendant to withdraw his plea of guilty where it appears, prior to sentencing, that defendant did not understand the charges or acted as a result of mistake. DeLeon v.

United States, 355 F.2d 286, 2 CLB No. 2, p. 39.

Court of Appeals, 9th Cir. Where defendant moves to set aside guilty plea after being initially sentenced under 18 U.S.C. 4208(b) but before final sentence is imposed, the standard to be applied is the normal pre-sentence discretion of the trial court rather than the post-sentence "to correct manifest injustice" test set forth in Rule 32(d), F.R. Cr.P. Sherman Jr. v. United States, 383 F.2d 837, 3 CLB 561.

§37.75. Motion to withdraw or set aside guilty plea – After sentence is imposed

Court of Appeals, 7th Cir. Seventeen year old who elects to be treated as juvenile and who pleads guilty without the assistance of counsel not permitted to withdraw plea of guilty after sentence. United States v. Hoston, 353 F.2d 723, 2 CLB No. 1, p. 42.

Arizona The trial court cannot entertain a motion to withdraw a plea of guilty once the defendant has been sentenced. State v. Barnes, 414 P.2d 149, 2 CLB No. 6, p. 47.

§37.80. Motion to withdraw or set aside guilty plea – Grounds

Michigan It was not an abuse of discretion to refuse withdrawal of a guilty plea after sentence, where the plea was based on an alleged promise by defendant's attorney that defendant would only be sentenced to probation. People v. Walls, 142 N.W.2d 38, 2 CLB No. 6, p. 47.

Pennsylvania Despite the fact that the prosecution apparently suppressed evidence that the victim of a felony murder was killed by a stray police bullet and not by one of the defendant's accomplices during the commission of a robbery, this does not entitle the defendant to withdraw his plea of guilty 19 years after it was entered – especially where, at that time, the law of Pennsylvania was to the effect that felony murder was chargeable against the felon even where the actual homicide was committed by a third person trying to capture or resist the felon. Commonwealth ex rel. Hough v. Maroney, 229 A.2d 913, 3 CLB 505.

§37.90. Motion to withdraw or set aside guilty plea – Right to hearing

Court of Appeals, 10th Cir. A seriously wounded defendant who was brought to court for the first time on a stretcher, given a lawyer and a shot of morphine in the courtroom, plead guilty to armed robbery, was sentenced to life imprisonment and was immediately thereafter taken to the prison hospital for a series of blood transfusions necessary to save his life was entitled to a hearing on his claim that his guilty plea was coerced by a county sheriff who told him that he would receive no further medical attention until he pleaded guilty. Hall v. Page, 367 F.2d 352, 2 CLB No. 10, p. 38.

Court of Appeals, 10th Cir. Where defendant sentenced under Federal Youth Correction Act (maximum of six years) claims that his plea was involuntary because he believed that the maximum sentence was only five years (under the underlying statute), court may not merely resentence him to five years. Where the files and records fail to show that the trial court advised the defendant of the maximum sentence pursuant to Rule 11, F.R. Cr.P., a hearing must be held on the voluntariness of his plea. Harper v. United States, 368 F.2d 53, 2 CLB No. 10, p. 39.

New York "It was erroneous as a matter of law when, upon the defendant's application to withdraw his guilty plea prior to sentence, the trial judge failed to inquire into the truth of the allegations that the defendant had been induced into pleading guilty by the threat of a heavier sentence and by a misunderstanding as to a promise of leniency." Defendant's statement at time of plea that no promises were made is not conclusive evidence of that fact. People v. Granello, 18 N.Y.2d 823, 2 CLB No. 9, p. 60.

§40.00. Motion to withdraw or set aside guilty plea – Burden of proof

Court of Appeals, 5th Cir. Where the trial court has not complied with Rule 11

by determining that a guilty plea is made voluntarily with understanding of the nature of the charge, the burden of proof for voluntariness shifts to the government in any post-conviction proceeding to vacate the judgment or withdraw the guilty plea. Rimanich v. U.S., 357 F.2d 537, 2 CLB No. 4, p. 37.

§40.10. Guilty plea as waiver of all prior jurisdictional defects

Court of Appeals, 8th Cir. Failure of counsel to challenge admissibility of arguably inadmissible confession which would have provided bulk of incriminating evidence at trial is not ground for habeas corpus relief where petitioner pleaded guilty to the charges and also admitted guilt at habeas hearing. Foster v. U.S., 359 F.2d 497, 2 CLB No. 6, p. 43.

Court of Appeals, 10th Cir. Guilty plea, voluntarily made, constitutes waiver of defense of double jeopardy. Cox v. Crouse, 376 F.2d 824, 3 CLB 328.

District Court (N.Y.) A plea of guilty is not a waiver of non-jurisdictional defects where a state statute specifically reserves a federal constitutional issue for state appellate review subsequent to the plea. Jackson v. Warden, Greenhaven Prison, 255 F.Supp. 33, 2 CLB No. 6, p. 34.

Maryland A voluntary plea of *nolo contendere* waives objection to the validity of a search and seizure of evidence upon which the indictment was based. Frazier v. Warden, 221 A.2d 60, 2 CLB No. 8, p. 57.

§40.20. Guilty plea not waiver where prior defect renders plea involuntary

Court of Appeals, 9th Cir. Where state prisoner claims that his plea of guilty was induced by coerced confession, he may (depending on the state of the record) be entitled to federal habeas hearing as to whether his primary motivation in pleading guilty was the coerced confession or whether it was "his own knowledge of his guilt and his desire to take his medicine." Doran v. Wilson, 369 F.2d 505, 3 CLB 40.

§41.00. Proceeding to determine defendant's competency to stand trial

Court of Appeals, 4th Cir. Virginia state procedure under which defendant found incompetent to stand trial by hospital officials may be indefinitely confined without notice and without a hearing held unconstitutional. Miller v. Blalock, 356 F.2d 273, 2 CLB No. 3, p. 44.

§41.40. Removal of case to federal court

United States Supreme Court Removal jurisdiction of federal district court under 28 U.S.C. 1443(1) is limited to claims of racial inequality where a clear showing is made that petitioner will be denied or cannot enforce a particular federal right. Georgia v. Rachel, 384 U.S. 780, 2 CLB No. 6, p. 29.

Court of Appeals, 5th Cir. A petition for removal of Mississippi trespass prosecution filed in Federal Court after appeal from police court and before a *de novo* trial in state court was a filing "before trial" within meaning of 28 U.S.C. 1446(c). Calhoun v. City of Meridian, 355 F.2d 209, 2 CLB No. 2, p. 41.

§41.50. Nolle prosequi

Court of Appeals, District of Columbia The U.S. Attorney for the District of Columbia may "nolle" a criminal charge pending in the District of Columbia Court of General Sessions without obtaining leave of that court. The only limitation upon him is that the power not be arbitrarily or oppressively used. Smith v. District of Columbia, 219 A.2d 842, 2 CLB No. 7, p. 48.

§43.00. Conduct of trial – In general

Ohio (a) Defendant properly handcuffed during trial under circumstances of this case; (b) autopsy report and death certificate properly received in evidence (c) prosecutor's use, in summation, of items not in evidence was permissible; (d) prosecutor's remarks intemperate but not prejudicial. State v. Woodards, 215 N.E.2d 568, 2 CLB No. 5, p. 44.

§43.02. Disqualification of trial judge

Court of Appeals, 5th Cir. Trial judge's

receipt of defendant's pre-sentence report following guilty verdict in non-jury trial does not disqualify him from hearing additional evidence upon a reopening of the case based upon an alleged post verdict change in prosecution "witness" testimony. Kenneth Smith v. United States, 360 F.2d 590, 2 CLB No. 5, p. 43.

Court of Appeals, 9th Cir. Although 28 U.S.C. 445 provides that "[a]ny justice or judge of the United States shall disqualify himself . . . in any case in which he has been of counsel . . . ," it was not reversible error for defendant to be sentenced by district judge, who was the U.S. Attorney at the time indictment was filed, but who had not personally participated in the prosecution, where both defendant and his attorney in open court consented to proceed. Thomas v. United States, 363 F.2d 849, 2 CLB No. 7, p. 30.

Alabama In response to the Governor's request for an advisory opinion the Supreme Court of Alabama "opined" that no one who was not admitted as a member of the Alabama bar or entitled to be admitted without further examination could hold the office of Circuit Judge or Solicitor. It further advised that the Governor could appoint a member of the State legislature (providing he fulfilled the abovementioned requirements) to such office. Opinion of the Justices, 181 So.2d 105, 2 CLB No. 2, p. 47.

Tennessee Defendant's right to a fair trial is violated under Tennessee Constitution where the same judge who issues warrant of arrest also presides at trial. Hamilton v. State, 403 S.W.2d 302, 2 CLB No. 7, p. 43.

§43.05. Defendant's right to continuance or adjournment

Arizona It was error for the trial court to refuse a continuance based upon the fact that defendant was suffering from amnesia and was unable to assist in the defense. Court should have granted reasonable continuance for purpose of determining extent of amnesia and whether it was permanent or temporary condition. State v. McLendon, 419 P.2d 69, 3 CLB 48.

California Trial court's refusal to delay or declare mistrial until recuperation of defendant's counsel who had suffered heart attack in middle of trial held reversible error. Assignment of law partner over objection of defendant improper. People v. Crovedi, 417 P.2d 868, 2 CLB No. 9, p. 55.

South Carolina It was an abuse of discretion for trial court to refuse to grant continuance where (a) the defendant had been in state mental institution for one year prior to trial; (b) defense counsel represented to the court that the defendant was unaware of the situation and was not cooperating in preparing the case; and (c) defense psychiatrist told the court that he needed more time to examine the defendant since this was a difficult case. The conviction for murder was reversed since the defendant had in effect, been precluded from presenting his defense of insanity. State v. Bell, 156 S.E.2d 313, 3 CLB 649.

Washington Municipal court judge erred in forcing defendant to stand trial without counsel in traffic offense case where counsel was engaged in trial of another case. City of Seattle v. Buerkman, 408 P.2d 258, 2 CLB No. 1, p. 59.

§43.08. Trial judge's duty to advise defendant of his statutory rights

New York Failure to inform defendant of his right to trial before three judges (as opposed to a single judge) is not a jurisdictional defect. The necessity to so advise him may be waived under certain circumstances. People v. Simpson et al., 17 N.Y.2d 409, 2 CLB No. 6, p. 47.

§43.10. Defendant's right to a public trial

Arkansas Defendant's right to public trial held violated where courtroom is ordered cleared because of altercation in the corridor. Sirratt v. State, 398 S.W.2d 63, 2 CLB No. 3, p. 56.

Illinois Trial court's exclusion of defen-

dant's children from courtroom prior to commencement of robbery trial held neither a violation of defendant's right to public trial nor an abuse of discretion: "Their presence in the courtroom could only serve to arouse the sympathy of the jury, and this, the defendant is not permitted to do. Further, this was a valid exercise of judicial discretion, because no good could have come of having the children hear their father's trial for an alleged robbery." People v. Dronso, 226 N.E.2d 460, 3 CLB 429.

Minnesota Defendant entitled to new trial without showing prejudice where trial judge unconstitutionally excluded public from courtroom. State v. Schmit, 139 N.W.2d 800, 2 CLB No. 3, p. 62.

Rhode Island The exclusion from the courtroom of possible witnesses does not constitute a denial of a defendant's right to a public trial. State v. Cyrulik, 214 A.2d 382, 2 CLB No. 1, p. 62.

§43.15. Defendant's right to appear in civilian clothes

Michigan Right to appear at trial in civilian clothes is procedural right and objection to defendant being brought to court in prison garb must be made at his first appearance in courtroom or it is untimely. People v. Shaw, 151 N.W.2d 381, 3 CLB 504.

§43.20. Absence of defendant or his counsel

Court of Appeals, 2nd Cir. The post-trial examination by the trial court of the informant was not a hearing and therefore it was not a deprivation of due process when the accused was not present and defense counsel was not allowed to fully cross-examine the informant. United States v. Tuck, 380 F.2d 857, 3 CLB 488.

Court of Appeals, 7th Cir. Absence of defendant from courtroom during brief proceeding (following submission of case to the jury) at which trial court, in the presence of both attorneys, answered two questions posed by the jury was error but did not require reversal of the conviction where the appellate court was convinced beyond a reasonable doubt that the error was harmless. Ware v. United States, 376 F.2d 717, 3 CLB 324.

Court of Appeals, 8th Cir. Where court has instructed jury in absence of defendant and his counsel, a reversal is required where government cannot show a clear lack of prejudice. Rice and Chipman v. United States, 356 F.2d 709, 2 CLB No. 3, p. 50.

Colorado Trial court's recall of jury during deliberations in the absence of counsel was reversible error. Nieto v. People, 415 P.2d 531, 2 CLB No. 8, p. 42.

§43.25. Decisions of defense counsel as binding upon defendant

United States Supreme Court Defense counsel's agreement to a *prima facie* trial in which he would not be able to cross-examine the state's witnesses held not binding upon defendant who told court that he was "in no way" pleading guilty to the charges. Brookhart v. Janis, 384 U.S. 1, 2 CLB No. 5, p. 30.

Pennsylvania A defendant need not accept aid of a particular attorney if he feels that he is inept or incompetent, but where counsel is retained, his decisions on trial strategy even on such matters as constitutional right to take the witness stand, will be binding upon the defendant and will not be reviewed on writ of habeas corpus. Commonwealth ex rel. Bell v. Rundle, 216 A.2d 57, 2 CLB No. 3, p. 68.

§43.30. Duty of trial court to order competency hearing sua sponte

United States Supreme Court Where defendant charged with murder had a long history of disturbed behavior, state trial judge should have ordered a hearing on his competency to stand trial even though no request was made by defendant. Failure to order competency hearing requires defendant's release unless new trial is ordered. Hearing now on his competency to stand trial then will serve no useful purpose. Pate v. Robinson, 383 U.S. 375, 2 CLB No. 3, p. 41.

Court of Appeals, District of Columbia

Notwithstanding a prior determination that defendant is competent to stand trial, where it appears during course of trial that defendant is either under the influence of narcotics or suffering from withdrawal symptoms, trial court must order a competency hearing. Hansford v. U.S., 365 F.2d 920, 2 CLB No. 7, p. 30.

California A *sua sponte* hearing on the question of a defendant's present competence is constitutionally required only if there is "substantial evidence" of the defendant's inability to understand the proceedings or to assist in his defense; more is required than a showing of bizarre behavior or statements, a claim by his attorney that he will not co-operate in his defense, or a psychiatric report finding him mentally ill but not mentioning his inability to stand trial. Cf. *Pate* v. *Robinson*, 383 U.S. 375 (1966); *People* v. *Pennington*, 426 P.2d 942, 66 A.C. 579, 58 Cal. Rptr. 374 (1967). People v. Laudermilk, 431 P.2d 228, 3 CLB 649.

Illinois Mere fact that evidence discloses that defendant suffered from epilepsy is insufficient to require trial court to suspend trial and hold a hearing on defendant's competency to stand trial. People v. Martin, 216 N.E.2d 170, 2 CLB No. 6, p. 44.

§43.35. Hearings outside presence of jury

Oklahoma Appellate court recommends hearing outside presence of jury on issue of whether prosecutor may cross-examine defendant's character witnesses concerning reports of defendant's misconduct. Miller v. State, 418 P.2d 220, 2 CLB No. 10, p. 48.

§43.40. Right of parties to reopen case after having rested.

Arizona Trial court did not abuse its discretion in permitting State to reopen its case after defense counsel argued on motion for directed verdict of acquittal that State had failed to prove that the heroin possessed was the requisite statutory amount to constitute the crime. State v. Cota, 408 P.2d 27, 2 CLB No. 1, p. 47.

Ohio Where defendant moved at the close of the case to dismiss traffic violation because of state's failure to prove venue, it was improper for court, after refusing to re-open case, to have permitted arresting officer to state under oath whether or not he had previously testified that the accident happened within court's jurisdiction. City of Cincinnati v. Anderson, 212 N.E.2d 620, 2 CLB No. 2, p. 49.

§43.45. Right to jury trial

New Hampshire Statutory procedure whereby conviction for intoxicated driving may be had without a jury trial and then appealed to a higher court with the right to a *de novo* trial by jury is constitutional. Suspension of driver's license pending appeal is a reasonable exercise of state's police power. State v. Despres, 220 A.2d 758, 2 CLB No. 8, p. 50.

New York Replacement of juror with alternate subsequent to the commencement of deliberation without the consent of the defendant held a violation of his right to jury trial. People v. Ryan, 19 N.Y.2d 100, 3 CLB 14, 28.

§43.50. Right to waive jury trial

Nebraska Supreme Court of Nebraska holds that right to a jury trial in felony case is personal to defendant, and should defendant wish to waive a jury, the state is without power to require one. State v. Carpenter, 150 N.W.2d 129, 3 CLB 428.

New York Trial judge's refusal to permit waiver of jury trial "because he needed the aid of twelve citizens to tell me what the facts are" is reversible error. However, the petitioner's failure to raise the issue on direct appeal bars review by habeas corpus. People ex rel. Rohrlich v. Fay, 20 N.Y.2d 297, 3 CLB 428.

§44.00. Conduct of trial judge — In general

North Carolina Trial court's action in telling defendant's chief witness not to leave the court after testifying and then conferring with the sheriff who immediately placed the witness in the prisoner's box in the court room constituted prejudicial

error since the entire episode "would unerringly lead the jury to the conclusion that the witness was guilty of perjury or some other crime," thereby discrediting the defense witness in the eyes of the jury. State v. McBryde, 155 S.E.2d 266, 3 CLB 573.

§44.05. Conduct of trial judge — Introductory comments

Alaska Trial court's question propounded to prospective jurors as to whether any of them had "ever sat on a jury in which [defendant] has been involved" was not improper as indicating to them that defendant has been previously tried and convicted. McCracken v. State, 431 P.2d 513, 3 CLB 661.

Kentucky Reviewing court criticizes trial court for unnecessary and erroneous introductory remarks to jury prior to taking of testimony. Testimony of former wife held admissible where other persons had equal opportunity to observe acts to which witness testified. York v. Commonwealth, 395 S.W.2d 781, 2 CLB No. 1, p. 49.

§44.10. Conduct of trial judge — Examination of witnesses

Illinois Trial court's improper and partisan questioning of defendant before jury requires reversal. People v. Martin, 214 N.E.2d 324, 2 CLB No. 4, p. 48.

Kentucky It was improper for the trial judge to question a recalcitrant witness in a manner which reflected his belief that the defendant had intimidated the witness. It was error to read prior statements of the same witness where the witness merely refused to testify. Davidson v. Commonwealth, 394 S.W.2d 911, 2 CLB No. 1, p. 48.

§44.15. Conduct of trial judge — Statements as constituting a comment on defendant's failure to testify

Court of Appeals, 5th Cir. Trial judge's direction to defense counsel to "call your own witnesses" held an improper comment on failure of defendants to testify. Davis v. United States, 357 F.2d 438, 2 CLB No. 3, p. 47.

California Comment on defendant's failure to speak for voice-identification not a violation of his privilege against self-incrimination. People v. Ellis, 421 P.2d 393, 3 CLB 88, 98.

§44.18. Conduct of trial judge — Prejudical comments

New Jersey Conviction reversed where record as certified by court stenographer revealed trial judge's use of racial epithet "Nigger" despite the fact that reviewing court felt word was incorrectly transcribed. State v. Roberts, 220 A.2d 416, 2 CLB No. 8, p. 43.

§44.20. Conduct of trial judge — Comments on the evidence

Court of Appeals, 6th Cir. The trial judge's statements made in the presence of the jury that certain of the testimony that the prosecutor was seeking to elicit was cumulative and related to matters already "proved" was held to be reversible error. United States v. Ornstein, 355 F.2d 222, 2 CLB No. 1, p. 34.

Ohio Conviction reversed where trial judge indicated his opinion as to the proper inference to be drawn from the testimony of state's witness. State v. Sutton, 219 N.E.2d 307, 2 CLB No. 9, p. 42.

§44.25. Conduct of trial judge — Limitations on the right of summation

Court of Appeals, 6th Cir. Where defense counsel does not request additional time, trial court's imposition of thirty-five minute limit for closing argument in 5 day trial held not an abuse of discretion. United States v. Mills, 366 F.2d 512, 2 CLB No. 9, p. 26.

Pennsylvania Where counsel requested and was denied the right of summation in a non-jury trial, appellant's conviction for intoxicated driving was reversed. Subsequent opportunity to review the evidence in post-trial motion proceedings did not cure original error in refusing to allow

summation. Commonwealth v. McNair, 222 A.2d 599, 2 CLB No. 10, p. 64.

§44.30. Conduct of trial judge — Discretionary exclusion of evidence

Indiana Trial court's refusal to permit defendant to put on sunglasses and cap worn by robber to see if victims could identify him was not an abuse of discretion. White v. State, 229 N.E.2d 652, 3 CLB 655.

§44.35. Conduct of trial judge — Exclusion of witnesses from courtroom

Louisiana Action of trial court in excluding all defense witnesses from courtroom but allowing state's only two witnesses to remain frustrated defendant's right to effective cross-examination and required reversal of the conviction. State v. Lewis, 199 So.2d 907, 3 CLB 515.

§44.40. Conduct of trial judge — Fixing order in which witnesses shall testify

Court of Appeals, 6th Cir. It is not an abuse of discretion to require a particular defendant in a multiple defendant trial to testify first before offering any other evidence. U. S. v. Shipp, 359 F.2d 185, 2 CLB No. 5, p. 42.

§44.50. Conduct of trial judge — Announcement of in camera rulings to the jury

Court of Appeals, 6th Cir. Trial judge's announcement in presence of jury that he had denied each of defense counsel's requests to charge constituted reversible error. United States v. Costner, 359 F.2d 969, 2 CLB No. 6, p. 37.

§44.60. Conduct of trial judge — Disclosure that co-defendant has pleaded guilty

Court of Appeals, 6th Cir. In the absence of "aggravating circumstances," a change of a co-defendant's plea in the presence of a jury is not reversible error; nor is the trial judge under any duty to give a *sua sponte* cautionary instruction. United States v. Kimbrew, 380 F.2d 538, 3 CLB 483, 495.

Florida Where defendant was on trial for first degree murder as an accomplice, it was error for the trial court to inform the jury that the co-defendant had pleaded guilty during the trial. Moore v. State, 186 So.2d 56, 2 CLB No. 6, p. 44.

§44.65. Conduct of trial judge — Charging grand jury in presence of petit jury panel

Court of Appeals, 8th Cir. It was not prejudicial error for trial judge to impanel and instruct new grand jury in the presence of a petit jury panel from which the jury that convicted defendant was selected. Gordon v. United States, 384 F.2d 598, 3 CLB 636.

§44.70. Conduct of trial judge — Allowing amendment of indictment

Illinois It was not error for trial court in forgery prosecution to permit an amendment of the indictment to change the name of the person allegedly defrauded. People v. Marks, 211 N.E.2d 548, 2 CLB No. 1, p. 56.

§44.75. Conduct of trial judge — Restriction on right of cross-examination

California Where defendant is on trial for four separate robberies, he cannot insulate himself from cross-examination on counts three and four by limiting his direct testimony to an alibi as to counts one and two. People v. Perez, 422 P.2d 597, 3 CLB 143, 182.

California Trial court committed reversible error in refusing to permit testimony that eleven-year old prosecutrix, in prosecution for sexual offense, had committed specific sexual act with others, contrary to her testimony on direct examination that she had never had sexual experiences. People v. Clark, 407 P.2d 294, 2 CLB No. 1, p. 53.

Illinois It was prejudicial error for the trial court to refuse to permit cross-examination of a prosecution informant

with respect to a pending criminal prosecution against him in an effort to establish bias and motive to lie. People v. Velez, 219 N.E.2d 675, 2 CLB No. 9, p. 45.

Illinois It was proper cross-examination to question defendant about her failure to tell police officer, immediately after the discovery of the homicide, that a fight had occurred between the deceased and a third party. People v. Weinstein, 213 N.E.2d 115, 2 CLB No. 2, p. 47.

New York Defendant was deprived of a fair trial where the court refused to permit cross-examination into the possible inconsistencies in officers' testimony concerning a confession. People v. Sabella, 264 N.Y.S.2d 642, 2 CLB No. 1, p. 53.

§45.05. Conduct of prosecutor — Prosecutor's discretion to prosecute

United States Supreme Court Where each defendant, convicted on his plea of guilty to a one count indictment charging a single sale of narcotics in violation of 26 U.S.C. 4705(a), succeeded in setting aside the conviction because of a technical defect in the indictment, the government's action in reprosecuting him in a three count indictment charging the original violation and two new violations all based on the same single sale was neither culpable nor oppressive. United States v. Ewell and Dennis, 383 U.S. 116, 2 CLB No. 3, p. 42.

Court of Appeals, District of Columbia Whether defendant would be prosecuted as first or multiple felony offender was solely within prosecutor's discretion. Court could not *sua sponte* impose additional penalty as multiple felony offender. Lawrence v. U. S., 224, A.2d 306, 3 CLB 53.

Court of Appeals, 8th Cir. Where completed bank larceny has occurred, "merger" doctrine does not prevent government from prosecuting defendant on charge of entering bank with intent to commit a felony which carries a maximum of twenty years rather than on the completed larceny which carries a maximum of only ten. Smith v. United States, 356 F.2d 868, 2 CLB No. 3, p. 50.

§45.10. Conduct of prosecutor — Comments made during opening statement

Court of Appeals, 2nd Cir. Although defendant's admissions were excluded from evidence at the trial on the ground that they were coerced, prosecutor's earlier reference to them in his opening statement did not violate due process where no objection was made by defense counsel and where the trial judge, during the course of the defendant's direct examination, instructed the jury that there were no admissions or confessions before them and that the prosecutor's opening was "merely an opening" which was "out of the case." United States ex rel. Fernanders v. Fay, 359 F.2d 767, 2 CLB No. 4, p. 39.

Missouri Opening remark by prosecutor to prospective jurors that the juvenile court had certified the defendant to be tried as an adult, did not constitute reversible error, "since the average juror would not have any definite idea concerning the meaning of such an order." Missouri v. Brown, 404 S.W.2d 179, 2 CLB No. 8, p. 44.

New York Appellate Division Conviction reversed where prosecutor in opening to jury referred to (a) the prior identification of defendant by complaining witness and to (b) the complainant's description of the defendant as the perpetrator of the crime which was given to the police. People v. Bothvell, 26 A.D.2d 585, 2 CLB No. 8, p. 42.

New York Appellate Division It was substantial error for the prosecutor in selecting the jury to refer to the defendant as a suspended police officer. People v. Davies, 26 A.D.2d 573, 2 CLB No. 8, p. 42.

§45.20. Conduct of prosecutor — Comments made during summation — in general

Court of Appeals, 9th Cir. Where sole defense is insanity, it is fundamentally unfair for prosecutor in his closing remarks on summation to tell jury that if they find

defendant not guilty by reason of insanity, he will walk out a free man and be turned loose on society. Evalt v. United States, 359 F.2d 534, 2 CLB No. 4, p. 33.

Arizona During the course of his summation, defense counsel stated: "This is probably the weakest case, and maybe the poorest job of police work I have seen in a long time."

And the prosecutor replied:

"First of all, the defense counsel states that the state has a weak case. Ladies and gentlemen of the jury, there are facts that you must decide and must be decided by you. Had this been a weak case, the court would have directed us out."

The prosecutor's statement was held to be prejudicial error. The trial court should have, at the very least, stricken the statement and instructed the jury to disregard it. State v. Cortez, 418 P.2d 370, 2 CLB No. 10, p. 64.

Arizona Where the state's witnesses had testified to the existence of certain property which was material to the prosecution, defense counsel had the right to inquire, in summation, into the whereabouts of such property. It was reversible error for the prosecuting attorney to state on summation and in response to counsel's argument that the property was in the possession of the police, because there was no basis in the record for such argument. State v. Brazeal, 408 P.2d 215, 2 CLB No. 1, p. 64.

California Harmless error found where prosecutor (1) told jury that murder defendant would be "turned loose" if found insane, (2) commented on defendant's failure to testify, and (3) told jury that defendant had already been convicted and sentenced to death twice for the same murder. People v. Modesto, 427 P.2d 788, 3 CLB 507.

New York Conviction reversed where prosecutor's summation was prejudicial and unethical. People v. Castelo, 264 N.Y.S.2d 136, 2 CLB No. 1, p. 48.

Texas The defendant's right to a fair trial was not violated where the prosecutor referred to him as a "Latin-American punk" and the trial court instructed the jury to disregard that statement. Yanez v. Texas, 403 S.W.2d 412, 2 CLB No. 7, p. 43.

Texas Prosecutor's summation that "[defense counsel] makes the insinuation that this defendant has told him that he was not guilty, but he won't take the stand under oath and tell you that," is not prejudicial error, since it was not clear from the context of the summation whether the reference to "he" applied to the defendant or his attorney. Meyer v. State, 416 S.W.2d 415, 3 CLB 587.

Washington It was prejudicial error for the prosecutor three times, in summation, to refer to defendant's "eight years of crime" where the only testimony to that effect came from an accomplice who testified that the defendant told her that he had forged checks for eight years and where only one prior conviction had been proved. State v. Eichman, 418 P.2d 418, 2 CLB No. 10, p. 64.

§45.25. Conduct of prosecutor — Comment on defendant's failure to testify

Alaska Supreme Court of Alaska adopts the test of *Knowles* v. *United States*, 224 F.2d 168, 170 (10 Cir. 1955) for determining whether statement constitutes improper comment on defendant's failure to testify: i.e. whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. McCracken v. State, 431 P.2d 513, 3 CLB 661.

Arizona Prosecutor's comment on defendant's failure to testify constituted reversible error, notwithstanding the fact that it was "invited" by defense counsel's prior explanation. State v. Smith, 420 P.2d 278, 3 CLB 13, 27.

Connecticut Closing statement in prosecutor's summation that "defense counsel and the judge will instruct you as to whether any inferences can be taken or deducted from the fact that Mr. Chasse

didn't take the stand" constituted improper comment upon the defendant's failure to take the stand. State v. Chasse, 230 A.2d 51, 3 CLB 512.

Florida Prosecutor's comment in cross-examining the defendant at trial on defendant's failure to testify at the preliminary hearing constitutes prejudicial error, requiring a new trial. Hines v. Florida, 186 So.2d 820, 2 CLB No. 7, p. 59.

Florida Prosecutor's remarks in larceny prosecution that there had been no rebuttal evidence to prosecutor's proof that money had been taken, that "there must have been an intent to take it," and that the presence in the store of defendant's fingerprints had not been explained by the defense were held to constitute an improper comment on defendant's failure to testify. Conviction reversed. Flaherty v. State, 183 So.2d 607, 2 CLB No. 4, p. 57.

Florida Prosecutor's statement to jury that it could infer that defendant stole the goods from the fact of possession and the absence of any reasonable explanation was not an improper comment on the defendant's failure to testify where prosecutor made clear that he was referring to the time of possession, not the time of trial. Miley v. State, 186 So.2d 299, 2 CLB No. 6, pp. 12, 21.

New Jersey Where defendant did not take the stand, prosecutor's comments in summation that "there is no defense" held a violation of the privilege against self-incrimination. State v. Persiano, 220 A.2d 117, 2 CLB No. 7, p. 49.

§45.30. Conduct of prosecutor — Comment on failure of defense to call certain witnesses

Kentucky Comment by prosecutor in summation on the failure of the defendant's wife to take the stand in his behalf was prejudicial error. Gossett v. Kentucky, 402 S.W.2d 857, 2 CLB No. 7, p. 50.

New Jersey Despite statute providing that no comment can be made upon the failure of the spouse of a criminal defendant to testify, prosecutor's comment upon the defendant's failure to call his wife as a witness does not warrant reversal where defense counsel told the jury on the *voir dire* and in his opening statement that the defendant's wife would testify. Remark is considered fair comment upon defense counsel's representation that she would be called. State v. Lowery, 231 A.2d 361, 3 CLB 589.

Texas Prosecutor's improper impeachment of state's witness and insistence by trial court and prosecutor that defendant's wife take the stand and assert her marital privilege in the presence of the jury, although earlier informed that she would refuse to testify each constituted reversible error. Wall v. State, 415 S.W.2d 59, 3 CLB 589.

§45.35. Conduct of prosecutor — Improper expressions of opinion

Court of Appeals, 3rd Cir. Prosecutor's statement made during opening to jury in Federal counterfeiting prosecution that, "I am convinced, as I am sure you will be when you hear the evidence and see it presented before you, that there will be no question but that defendant, Meisch, is guilty of the crime charged," held not improper. United States v. Meisch, 370 F.2d 768, 3 CLB 42.

Court of Appeals, 5th Cir. Prosecutor's expression of opinion as to government witnesses' credibility constituted reversible error. Gradsky v. United States, 373 F.2d 706, 3 CLB 144, 183.

Illinois Prosecutor's exhortation to jury in rape prosecution that "[I]f you don't do your duty now [and send the defendant away], in my opinion, you are committing as great a crime as this beast did" held to be an improper expression of prosecutor's personal opinion. People v. Payton, 218 N.E.2d 518, 2 CLB No. 8, pp. 19, 26.

Michigan The prosecutor's statement in summation that the People didn't believe the defendant was in another city on the day of the crime was reversible error as an improper expression of opinion and because it was contrary to the information which the prosecutor possessed. People v.

Kirby, 144 N.W.2d 653, 2 CLB No. 9, p. 54.

Oklahoma Prosecutor's aside to jury that statement of witness was "horse-feathers" improper, but not reversible error. Carr v. State, 417 P.2d 833, 2 CLB No. 9, p. 55.

§45.38. Conduct of prosecutor — Defense counsel's "opening the door"

Nevada Prosecutor's reference to defendant in summation as a "mad dog," while improper, does not constitute reversible error where the defendant's guilt was clearly established and the remark was to some degree provoked by defense counsel. Pancheo v. State, 414 P.2d 100, 2 CLB No. 6, p. 55.

New Mexico Defense counsel's comment in summation as to his client's failure to take stand entitles prosecutor to make a similar comment. The initial comment is deemed to be a waiver of any right to claim error because of prosecutor's comment. State v. Paris, 414 P.2d 512, 2 CLB No. 6, p. 54.

§45.40. Conduct of prosecutor — Calling witness who prosecutor knows will claim Fifth Amendment privilege

Court of Appeals, 6th Cir. It is plain error for government to call witness whom it knows will claim privilege and then ask irrelevant questions calling for inadmissible answers. U.S. v. Compton, 365 F.2d 1, 2 CLB No. 8, p. 37.

New Jersey Action of prosecutor in calling an associate of defendant to the witness stand, who in turn, claimed his privilege against self-incrimination held not prejudicial where there was no indication that the prosecution knew or should have known that witness would claim privilege and where defendant failed to request a "no unfavorable inference" charge. State v. Fournier and Schlatter, 221 A.2d 225, 2 CLB No. 8, p. 41.

§45.50. Conduct of prosecutor — Suppression of evidence

Court of Appeals, 7th Cir. Seventh Circuit, in the exercise of its supervisory powers, reverses kidnapping conviction where the government failed to disclose to defense counsel an F.B.I. report containing a statement of the doctor who examined the victim that (contrary to her trial testimony) she had not been raped and where the doctor had not been called as a witness and his correct identity had not been made known to defense counsel. United States v. Poole, 379 F.2d 645, 3 CLB 325.

New Jersey Prosecutor's failure to reveal to jury at defendant's murder trial that he had promised the defendant's accomplice that he would recommend leniency if he would testify against the defendant violates due process. State v. Taylor, 231 A.2d 212, 3 CLB 588.

New York Where evidence not disclosed by prosecutor was, in the court's opinion, either of dubious reliability or was already within the knowledge of defense counsel there was no suppression of exculpatory evidence requiring a new trial. People v. Fein, 18 N.Y.2d 162, 2 CLB No. 7, p. 43.

§46.00. Sufficiency of evidence — Individual crimes

Court of Appeals, District of Columbia Possession of only a trace of heroin, in the absence of proof that such quantum could be used or dispensed as a narcotic drug, is insufficient to sustain a conviction for possession of narcotics. Marshall v. United States, 229 A.2d 449, 3 CLB 428.

Court of Appeals, 3rd Cir. Evidence that union business agent received initiation fee and that fee was never entered in union records insufficient to sustain conviction for converting union fees where secretary-treasurer co-defendant to whom business agent was supposed to give fee was apparently embezzling union funds himself and had died prior to trial. United States v. Lynch, 366 F.2d 829, 2 CLB No. 9, pp. 25, 26.

Court of Appeals, 5th Cir. Testimony as to defendant's presence in automobile containing seventeen cases of one gallon glass jugs three hundred yards from still, and his flight therefrom upon dynamiting

of still by revenue agents is insufficient to sustain conviction for possession of the jugs with intent to use them in a moonshine business. Williams v. United States, 361 F.2d 280, 2 CLB No. 6, p. 31.

Florida Evidence of identity held insufficient as matter of law. Ross v. State, 190 So.2d 187, 2 CLB No. 10, p. 52.

Illinois Inability of complainant in rape prosecution to make positive identification of defendant held not fatal. Identity may be established by circumstantial evidence. People v. Jones, 213 N.E.2d 69, 2 CLB No. 2, p. 48.

Illinois Eye-witness identification insufficient to establish guilt beyond reasonable doubt where it was doubtful, vague, and uncertain. People v. Marshall, 221 N.E.2d 133, 3 CLB 13, 27.

New York Where indictment for common law murder was founded on insufficient evidence, Court of Appeals reverses conviction for felony-murder, although proof at trial was sufficient to warrant conviction. People v. Jackson, 20 N.Y.2d 440, 3 CLB 56.

North Carolina Testimony by state's only eye witness, a 16 year old boy, that he could observe the facial features of the defendant 300 feet away at night is inherently incredible and warrants a reversal especially where police then employ a line-up procedure which is clearly suggestive. State v. Miller, 154 S.E.2d 902, 3 CLB 503.

Wisconsin Fact that hotel guest left baggage on which innkeeper's lien could be impressed is not sufficient to require an acquittal of his conviction for intentionally absconding without paying his hotel bill. State v. Croy, 145 N.W.2d 118, 2 CLB No. 10, p. 52.

§46.20. Sufficiency of evidence — Requirement of corroboration — accomplice testimony

Court of Appeals, 3rd Cir. Testimony of an individual convicted of misprision of the underlying felony was held not to be testimony of an "accomplice" within the meaning of the Virgin Island statute requiring that accomplice testimony be corroborated. Government of the Virgin Islands v. Solis, 359 F.2d 518, 2 CLB No. 3, p. 44.

Texas Testimony that defendant was near the scene of the crime approximately four hours before the burglary is insufficient to corroborate accomplice testimony. Fernandez v. State, 396 S.W.2d 885, 2 CLB No. 2, p. 47.

Washington An accomplice testifying for the state may be permitted to testify that she has been convicted of the crime based upon her plea of guilty. State v. Redden, 426 P.2d 854, 3 CLB 341.

Wisconsin Defendant can be convicted of conspiracy on uncorroborated testimony is not "bald perjury, preposterous, or self-contradictory." State v. Yancey, 145 N.W.2d 145, 2 CLB No. 10, p. 51.

§46.30. Sufficency of evidence — Requirement of corroboration — drug addict-witness

Illinois Uncorroborated testimony of police informer who is also narcotics addict is sufficient to sustain conviction for unlawful sale of narcotics. People v. Baxter, 221 N.E.2d 16, People v. Johnson, 221 N.E.2d 59, 3 CLB 53.

Wisconsin Uncorroborated testimony of drug addict sufficient to sustain conviction for sale of narcotics. The question is one of credibility not competency. Tobar v. State, 145 N.W.2d 782, 3 CLB No. 1, p. 53.

§46.40. Sufficiency of evidence — Requirement of corroboration — sex crimes

Court of Appeals, District of Columbia A rape victim's identification based on an "adequate opportunity to observe" need not be further corroborated where (1) there is no dispute that a rape in fact occurred, (2) consent is not an issue, (3) and there is no evidence undermining the victim's trustworthiness. Thomas v. United States, 387 F.2d 191, 3 CLB 327.

Georgia Supreme Court of Georgia holds

that opportunity to commit crime of rape is corroborative of rape. Worley v. State, 149 S.E.2d 682, 2 CLB No. 9, p. 52.

New York Supreme Court ". . . Where a criminal assault is committed solely in furtherance of the ultimate goal of rape, and there is uncorroborated testimony in the record that the rape was consummated, there is no lawful basis for charging a defendant with the commission of the antecedent assault. . . . Not only must the assault counts in the indictment before me be dismissed but a like result must ensue with reference to the third count of the indictment which accuses the defendant of criminal possession of the knife . . ." People v. Sigismondi, 266 N.Y.S.2d 724, 2 CLB No. 3, p. 63.

§46.50. Sufficiency of evidence — Proof of venue

Court of Appeals, 5th Cir. Burden of proving venue in federal criminal prosecution is on government and it must be established by a preponderance of the evidence. Cauley v. United States, 355 F.2d 175, 2 CLB No. 1, p. 45.

New Mexico Although venue need only be established by a preponderance of the evidence, the conviction must be reversed where the record fails to disclose where or in what county the crime was committed. State v. Glasscock, 415 P.2d 57, 2 CLB No. 7, p. 59.

§46.55. Sufficency of evidence — Corpus delicti

Court of Appeals, District of Columbia *Corpus delicti* of larceny prosecution not established by proof that defendant did not own property. Prosecution must establish property right in another person. Washington v. United States, 213 A.2d 819, 2 CLB No. 1, p. 52.

Arizona Absence of any physical evidence is no bar to a prosecution for inducing another to use narcotics. State v. Valenzuela, 418 P.2d 386, 2 CLB No. 10, pp. 25, 45.

§46.80. Necessity of laying foundation

Alabama Where pills seized in a valid search were commingled with those seized during an invalid one, and upon analysis, only some of the pills were narcotic, the conviction would have to be reversed because court could not detect the "good apples from the bad." Sheridan v. State, 187 So.2d 299, 2 CLB No. 7, pp. 9-27.

Alabama Testimony concerning post-mortem examination of body of deceased, made two days after murder, held admissible. Failure to establish that body was in same condition at date of death does not render testimony inadmissible. Kemp v. State, 179 So.2d 762, 2 CLB No. 1, p. 53.

§46.90. Relevancy

Arizona Where the defendant, a minister, was charged with the arson of the church building he occupied as a home, the prosecutor could not introduce evidence of a prior fire eleven years earlier on property owned by defendant without, at the very least, an initial showing that the earlier fire was criminal in nature. State v. Owen, 415 P.2d 907, 2 CLB No. 8, pp. 19, 27.

California The trial court erred in permitting the arresting officer to testify that the defendant, in response to police interrogation as to his name replied.

> "I don't have any name. You brought us over here from Africa and gave us names."

And in response to the officer's request to talk it over "man to man" the defendant replied, "What do you mean man to man, white man. I'm three times the man you'll ever be." The probative value of such testimony was outweighed by its prejudicial effect. However, the error was not prejudicial in light of the clear and convincing evidence of guilt. People v. La Vergne, 411 P.2d 309, 2 CLB No. 4, p. 53.

Florida Trial court properly refused to permit introduction of documents which established that federal government's dismissal of indictment in companion case was based upon insufficiency of evidence. Evidence was not material in prosecution under state law. Rainwater v. State, 186 So.2d 278, 2 CLB No. 6, p. 46.

Illinois Where evidence shows that gun was used in crime for which defendant is on trial, evidence that defendant was found in possession of a gun is admissible even though state cannot establish that the weapons were the same. People v. Johnson, 221 N.E.2d 497, People v. Ostrand, 221 N.E.2d 499, 3 CLB 52.

Oklahoma Weapon unconnected to defendant but found near scene of arrest held admissible as part of the "history of the arrest." Chase v. State, 415 P.2d 203, 2 CLB No. 7, p. 46.

§47.00. Best evidence rule

Alabama Introduction in evidence of shorthand reporter's transcribed notes containing defendant's unsigned confession without having the reporter testify as to the authenticity of the notes violated best evidence rule where the only evidence relating to the notes was a police officer's testimony that the reporter had given them to him. Bennefield v. State, 202 So.2d 55, 3 CLB 649.

Florida Tape recordings held best evidence of conversations recorded. Introduction of stenographic transcript of tape recording violates best evidence rule. Duggan v. State, 189 So.2d 890, 2 CLB No. 10, p. 52.

§47.10. Character and reputation evidence

Court of Appeals, District of Columbia Where defendant has neither testified nor otherwise placed his character in issue, introduction into evidence of inartfully disguised "mug shots" to bolster prosecution witness' court-room identification held reversible error. Barnes v. United States, 365 F.2d 509, 2 CLB No. 6, p. 35.

Court of Appeals, 10th Cir. Trial court's refusal in fraud prosecution to allow character witnesses to testify to defendant's reputation for honesty and integrity not reversible error where they were allowed to testify to reputation as a "good law abiding citizen." Edwards v. United States, 374 F.2d 24, 3 CLB 14, 27.

Florida Conviction for manslaughter by an intoxicated motorist reversed where liquor store clerk was permitted to testify that the defendant had purchased vodka two or three times a week over a two year period prior to the fatal collision, thereby wrongly putting the defendant's character in issue by showing that he was a habitual and long-time user of alcoholic beverages. Wadsworth v. State, 201 So.2d 836, 3 CLB 651.

Mississippi Prosecutor may not question character witnesses as to what their opinion would be if they were reliably informed of the defendant's guilt. Fact that alleged participant in crime committed suicide prior to trial is inadmissible. Craft v. State, 181 So.2d 140, 2 CLB No. 2, p. 57.

New Mexico Prosecutor criticized for asking *alibi* witness whether the latter was aware of defendant's prior conviction for similar crime. Court's instruction to disregard question did not cure improper tactic. Conviction reversed. State v. Rowell, 419 P.2d 966, 3 CLB 51.

South Dakota Introduction of defendant's revolver not connected with perpetration of crime constitutes improper evidence of bad character and requires that a new trial be granted. State v. McCreary, 142 N.W.2d 240, 2 CLB No. 6, p. 45.

Washington Where appellant's expert witness, a psychologist, testified in support of the insanity defense that appellant was "characteristically a passive man," it was proper for the state to show that appellant had a reputation in the community for being quarrelsome. State v. Johnson, 418 P.2d 238, 2 CLB No. 10, p. 52.

§47.20. Circumstantial evidence

California Fact that witness had to refer to documents to refresh his recollection did not alter the character of his evidence from direct to circumstantial. People v. Roubus, 417 P.2d 865, 2 CLB No. 9, p. 52.

Florida Testimony that some undetermined amount of wire had been stolen from a truck and that $300 worth of wire was replaced was insufficient to establish a theft of over $100 of wire (grand lar-

ceny). It was not known what amount of wire was used by employee in connection with the legitimate operation of the business. Moore v. State, 183 So.2d 563, 2 CLB No. 4, p. 54.

Florida Where evidence is wholly circumstantial and does not exclude all reasonable inferences of innocence, it is insufficient. Reynolds v. State, 186 So.2d 315, 2 CLB No. 6, pp. 12-21.

Mississippi Where defense was self-defense and there was "no issue as to who shot and killed the deceased," introduction into evidence of .22 caliber rifle found in defendant's car one hour after victim had been shot by a .22 caliber rifle did not warrant reversal even in the absence of scientific evidence that the rifle had been recently fired or was the murder weapon. Collins v. State, 202 So.2d 644, 3 CLB 653.

New York Circumstantial evidence of accomplice's knowledge of principal's intent to murder was insufficient under the circumstances to support premeditated murder conviction. People v. LaBelle, 18 N.Y. 2d 405, 3 CLB 70.

Virginia Introduction in evidence of federal gambling tax stamps in state prosecution for conducting lottery is proper to show that defendant purchased the stamps for the purpose of conducting a lottery for the profit. Perry v. Commonwealth, 156 S.E.2d 566, 3 CLB 651.

§47.22. Circumstantial evidence — Flight

Arizona Evidence of defendant's escape from jail held admissible as showing consciousness of guilt. State v. White, 416 P.2d 597, 2 CLB No. 9, p. 47.

§47.24. Circumstantial evidence — Intent

Arizona ". . . [T]he wrongful taking of another's property, without his consent *and with no apparent purpose of returning it*, in the absence of explanatory circumstances, evidences an intent to deprive the owner permanently of his property." (Emphasis by court) State v. Jackson, 420 P.2d 270, 3 CLB No. 1, p. 61.

Georgia Trial court erred in refusing to permit defendant to testify that he intended to return car. Intent to deprive owner permanently of his property is an essential element of larceny. Cain v. State, 145 S.E.2d 773, 2 CLB No. 2, p. 49.

New York Where state's evidence established that accused's accomplice, in an attempt to strike complainant, missed the mark, and instead struck complainant's automobile, damaging it, conviction for unlawfully and wilfully injuring personal property of another was reversed. State must establish intent to injure property. People v. Washington, 18 N.Y.2d 366, 2 CLB No. 10, p. 58.

§47.26. Circumstantial evidence — Motive

Court of Appeals, 2nd Cir. Evidence that the defendant was a narcotics user and earned only $65 per week held improperly received to show motive in theft prosecution. United States v. Mullings, 364 F.2d 173, 2 CLB No. 7, p. 34.

Court of Appeals, 9th Cir. It was not improper for the Government, which presented several witnesses who identified the appellant as the robber, to produce evidence that the appellant, shortly before the robbery, gave his landlady a check for a month's rent, which check was rejected by the bank on which it was drawn because of insufficient funds, and that, after the robbery, the appellant paid two months' rent in cash. Thompson v. United States, 368 F.2d 318, 2 CLB No. 10, p. 37.

Oregon Where defendant was charged with attempted burglary of a drug store, narcotics instruments seized from his person at the time of arrest were admissible in evidence as tending to prove that he was a drug addict (thus establishing a motive for the attempt). State v. Guerrero, 415 P.2d 28, 2 CLB No. 7, p. 45.

§47.30. Hearsay evidence

Court of Appeals, 6th Cir. Where, in a close case, prejudicial hearsay was received in evidence without objection by defense counsel but was later questioned by the jury in an inquiry to the trial judge

(Is it admissible?), trial judge's response that testimony was admitted and "there should be absolutely no question in your mind concerning the admissibility of the confession" required reversal of the conviction. United States v. Readus, 367 F.2d 689, 2 CLB No. 9, pp. 10, 39.

Idaho "We hold that third-party confessions, made out of court, are admissible only when there is other substantial evidence which tends to show clearly that the declarant is in fact the person guilty of the crime for which the accused is on trial." State v. Larsen, 415 P.2d 685, 2 CLB No. 8, p. 46.

Kentucky Witnesses's testimony that defendant's sister stated that defendant had admitted killing was erroneously received in evidence. Conviction reversed. Salisbury v. Commonwealth, 417 S.W.2d 244, 3 CLB 652.

New Jersey That portion of physician's written report containing the complainant's statement that he was sodomized was inadmissible hearsay. Neither the Business Record nor "treating-physician" exception to the hearsay rule were applicable. Complainant was not under a "business duty" to make an honest report. Nor was the statement as to the cause of the injury relevant to diagnosis and treatment. State v. Taylor, 217 A.2d 1, 2 CLB No. 4, p. 52.

New Jersey Where it was not clear that defendant knew of victim's death, his hearsay exculpatory statements made after the crime had been completed, should have been received in evidence. State v. Baldwin, 221 A.2d 199, 2 CLB No. 8, p. 46.

Oregon Conviction for car theft reversed where trial court erroneously received in evidence complainant's statement, contained in police report, to the effect that her car was stolen. State v. Crawley, 410 P.2d 1012, 2 CLB No. 4, p. 53.

§47.35. Hearsay evidence — Use of prior testimony

Court of Appeals, 3rd Cir. Before government may use prior testimony of witness who is beyond subpoena power of court, it must make genuine and bona fide effort to ascertain his whereabouts and secure his voluntary attendance including, if necessary, reimbursing him for his expenses of travel and subsistence. Aquino v. United States, 383 F.2d 734, 3 CLB 335.

§47.45. Hearsay evidence — Declarations of co-conspirators

Pennsylvania Rule that the declarations of co-conspirators after the termination of the conspiracy are not admissible as to the non-declarant does not operate to exclude evidence that co-conspirators had possession of the fruits of the crime (evidence that they spent $100 bills with same serial numbers as those stolen). Commonwealth v. Ellsworth, 218 A.2d 249, 2 CLB No. 5, p. 55.

§47.48. Hearsay evidence — Ratification of co-defendant's statement

Illinois Defendant's statement — "Well, you've got the right men, now prove it" — made to police after reading co-defendant's confession implicating him did not constitute a sufficient adoption of the confession so as to allow the confession in evidence against him. People v. Lagardo, 228 N.E.2d 241, 3 CLB 586.

§47.55. Hearsay evidence — Documentary evidence

Alaska A defendant by his own testimony may authenticate a document whose execution is in dispute. The document should be received in evidence upon a prima facie showing of authenticity.

Authentication is unnecessary where execution is not in issue. Selman v. State, 411 P.2d 217, 2 CLB No. 4, p. 51.

§47.70. Hearsay evidence — Presumptions and inferences

Court of Appeals, 8th Cir. Possession of recently (5 months) stolen non-negotiable Series E savings bond together with airplane flight information by defendant arrested at airport sufficient to sustain conviction for concealing stolen securities which were moving in interstate com-

merce. Lee v. United States, 363 F.2d 469, 2 CLB No. 7, p. 37.

Nevada Statute which presumes guilt from possession of stolen goods within six months of the theft is unconstitutional. Carter v. State, 415 P.2d 325, 2 CLB No. 8, p. 52.

North Carolina Defendant's presence as a passenger in an automobile in which stolen goods were discovered was insufficient basis for larceny conviction. State v. Hopson, 146 S.E.2d 642, 2 CLB No. 4, p. 54.

North Carolina Statute providing that in a criminal prosecution for driving under the influence of intoxicating liquor "the amount of alcohol in the person's blood . . . by chemical analysis of the person's breath shall be admissible in evidence and shall give rise to the following presumptions:

> 1) If there was at that time 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of intoxicating liquor."

does not create a conclusive presumption, but only a permissible inference which when considered with all of the other evidence may or may not establish guilt beyond a reasonable doubt; defendant also entitled to an instruction that if the jury believes his testimony that he was given two drinks of vodka by a stranger immediately after the accident and before the police arrived on the scene, the results of the Breathalyzer test could be of no probative value and create no inference. State v. Cooke, 155 S.E.2d 165, 3 CLB 576-77.

Oregon Evidence that defendant was passenger in automobile in which a stolen crowbar and sledge hammer were found and that the tools were used in a burglary shortly before defendant's arrest was insufficient to sustain conviction for concealing stolen property. Even assuming that the evidence was sufficient to establish possession, there was no evidence that defendant knew the tools were stolen. State v. Long, 415 P.2d 171, 2 CLB No. 7, p. 49.

Texas That defendant shared apartment with female did not preclude court from charging jury with respect to guilty inference which could be drawn from discovery of fruits of burglary in defendant's apartment; jury could have found that female was incapable of committing burglary. Dove v. State, 402 S.W.2d 913, 2 CLB No. 7, p. 37.

Washington Traffic ticket ordinance which provides that owner of vehicle is responsible for illegal parking and rules out defense that the vehicle was used by another, is unconstitutional. City of Seattle v. Stone, 410 P.2d 583, 2 CLB No. 3, p. 56.

§47.80. Hearsay evidence – Res Gestae

Florida Statement made by victim five to eight minutes after a shooting held to be inadmissible since not part of *res gestae*. Williams v. State, 188 So.2d 320, 2 CLB No. 8, p. 46.

Mississippi Testimony of defendant's witnesses that murder victim had stated that she didn't know how she had been burned should have been received where state's witnesses had testified to victim's accusations against defendant. Gamble v. State, 183 So.2d 172, 2 CLB No. 4, p. 49.

New Jersey Under "fresh complaint" rule, victim's mother was permitted to testify that victim told her that defendant had "put his hands down her panties and had touched her there," and that she had been "carnally abused." Testimony of "fresh complaint" may not usually include details except to indicate that complaint related to the criminal charge and identified the offender. State v. Balles, 221 A.2d 1, 2 CLB No. 8, p. 46.

South Dakota Hearsay statements of infant victim uttered three hours after incident held admissible. State v. Percy, 137 N.W.2d 888, 2 CLB No. 1, p. 52.

Tennessee Testimony by witness that defendant's daughter told him over the phone that her mother and father were fighting again was improperly admitted

at the defendant's trial for murdering his wife, as was testimony by a court clerk that the grand jury had not indicted the man that the defendant had identified as the assailant. Montesi v. State, 417 S.W. 2d 554, 3 CLB 653.

Texas Defendant's call to his wife, as police took him into custody five minutes after shooting, to get him Percy Foreman, "the only one that could help," was admissible as part of the *res gestae*. The statement was not inadmissible because it was made without aid of counsel. Murder conviction upheld. Smith v. State, 397 S.W.2d 70, 2 CLB No. 3, p. 58.

Washington Supreme Court of Washington lays down six requirements for *res gestae* exception to hearsay rule. State v. Shelby, 418 P.2d 246, 3 CLB 89, 99-100.

§48.00. Identification evidence — Fingerprints

Oklahoma It is the better practice for the fingerprint expert to state an opinion that the prints compared by him were not made by the same person; but he may express his opinion "either as to the possibility, probability or actuality of the fact without it being an invasion of the province of the jury." Lester v. State, 416 P.2d 52, 2 CLB No. 8, p. 49.

§48.40. Testimony of prior identification

New York Appellate Division Conviction reversed where police officer was permitted to testify to out of court identification of defendant by victim. People v. Ervin, 24 A.D.2d 996, 2 CLB No. 3, p. 59.

New Jersey A witness is competent to testify to the statements made by the victim and other witnesses of the crime at the time they identified the defendant in an out of court confrontation, since all of these witnesses were present in court and thus subject to cross-examination. State v. Mattock, 231 A.2d 369, 3 CLB 579.

New York Conviction reversed where police officer was permitted to testify to his previous identification of defendant from photographs and where second officer was permitted to testify that he observed the first officer's identification. The testimony was not justified by the fact that counsel sought to impeach the witness' credibility by suggesting that he had identified the defendant to obtain a promotion. People v. Caserta, 19 N.Y.2d 18, 3 CLB 55.

§48.50. Identification evidence — Speech

Court of Appeals, District of Columbia Requiring suspect to speak before victim who had heard but not seen him violated neither the privilege against self-incrimination, the *McNabb-Mallory* rule, nor due process. Wise v. United States, 383 F.2d 206, 3 CLB 486.

§48.60. Identification evidence — Clothing

Florida The defendant's privilege against self-incrimination was not violated when, in a lineup, he was required to wear the jacket identified as that worn by the robber during the robbery. Morris v. State, 184 So.2d 199, 2 CLB No. 5, p. 50.

Oklahoma It was prejudicial for trial court to admit decedent's bloody clothing into evidence where other competent evidence established the same fact, and where its admission clearly inflamed the jury. Brewer v. State, 414 P.2d 559, 2 CLB No. 6, p. 46.

§48.70. Identification evidence — Voice print

New Jersey Court discusses probative value of voiceprint evidence. State v. Cary, 230 A.2d 384, 3 CLB 512.

§50.00. Proof of other crimes to show motive, intent, etc.

Court of Appeals, 8th Cir. Eighth Circuit holds that informing jury of prior convictions at outset of trial pursuant to Habitual Offender Act does not deny defendant a fair trial by an impartial jury. Johnstone v. Swenson, 363 F.2d 643, 2 CLB No. 7, p. 36.

Court of Appeals, 9th Cir. Trial court erred in allowing government, in prosecution for interstate transportation of a stolen automobile to introduce, during its case in chief, evidence of a 1963 state con-

viction of defendant for auto theft on the theory that it was relevant to show intent or lack of mistake. Davis v. United States, 370 F.2d 310, 3 CLB 39.

Court of Appeals, 10th Cir. Failure of trial court to strike reference to defendants' prior police record necessitates reversal even though guilt was overwhelmingly established. Sumrall, et al. v. U. S., 360 F.2d 311, 2 CLB No. 5, p. 37.

Court of Appeals, 10th Cir. Evidence that defendant had also stolen certain mechanics tools at about the same time that he allegedly stole automobile held "technically" admissible to show intent or absence of mistake in prosecution for interstate transportation of a stolen motor vehicle. Morgan v. United States, 355 F.2d 43, 2 CLB No. 2, p. 37.

Court of Appeals, 10th Cir. Although government's theory in interstate transportation of stolen car case was that the defendant had intended to steal the car when he purchased it with a check drawn on a bank in which he had no account. It was error to permit the government to show as part of its case in chief a large number of other no-fund check transactions on the theory that they showed a common design and course of conduct. Mills v. United States, 367 F.2d 366, 2 CLB No. 10, pp. 24, 44.

Alabama Harmless error rule held to be inapplicable in murder prosecution where evidence of a prior crime is improperly introduced. Henton v. State, 189 So.2d 849, 2 CLB No. 10, p. 52.

Alaska When the same impeaching evidence is admissible to show the bias of a witness, but inadmissible to the extent that it is proof of a particular wrongful act of the witness, its admissibility will be governed by the apparent primary purpose of the party seeking to introduce it. Smith v. State, 431 P.2d 507, 3 CLB 652.

Arkansas Convictions reversed where court, acting under former law, admitted evidence of defendant's prior conviction for purposes of habitual criminal act before jury found guilt or innocence. Co-fendant without previous conviction also prejudiced because of possible inference of association with criminals. Cummings v. State, 396 S.W.2d 298, 2 CLB No. 2, p. 48.

California At a trial for taking indecent liberties with a 13-year-old boy, evidence of a similar crime committed with another boy is admissible to show common *modus operandi*. Possible prejudice through proof of mere criminal disposition or through inflammatory nature of crime is outweighed by probative value if the details are so similar that if defendant committed one, he must have committed the other. People v. Cramer, 429 P.2d 582, 3 CLB 579.

California Conviction reversed where proof of another crime was properly introduced but where defendant was not permitted to show that he had been acquitted of that charge. People v. Griffin, 426 P.2d 507, 3 CLB 347.

Colorado It was error to receive in evidence the defendant's refusal to give a statement to the police because "[T]his is my third fall in five years and the only chance I have is to fight this thing in court." Statement did not fall within the "guilty knowledge" exception to the rule prohibiting evidence of other crimes. Naranjo v. People, 419 P.2d 953, 3 CLB 53.

Colorado Where the defendant was on trial for assault with deadly weapon (switchblade knife) it was prejudicial error for the trial judge to charge the jury that possession of the knife was itself a violation of law. The error was not cured by a further instruction to the effect that the trial court did not intend to imply that the defendant was guilty of a violation of "that statute" and that defendant was on trial only for the assault. Judgment of conviction reversed. Watts v. People, 411 P.2d 335, 2 CLB No. 4, p. 58.

Georgia Proof that defendant committed or attempted to commit several prior rapes held admissible on a present rape charge. Anderson v. State, 150 S.E.2d 638, 3 CLB 51.

Illinois It was error for the trial court to

permit testimony establishing an unrelated robbery in order to rebut the defendant's alibi. The witness (victim) should have been permitted to testify only to the fact that defendant was in her presence at the time that he claimed to be elsewhere. People v. Fuerback, 214 N.E.2d 330, 2 CLB No. 4, p. 49.

Kansas Testimony of subsequent similar acts held admissible to establish intent notwithstanding acquittal of charges based upon the similar acts. State v. Darling, 419 P.2d 836, 3 CLB 51.

Kansas Testimony concerning defendant's attempt to conceal evidence, although unrelated to crimes charged, is admissible, despite the fact of possible prejudice to the defendant. State v. Williams, 413 P.2d 1006, 2 CLB No. 6, p. 51.

Kentucky It was reversible error in prosecution for armed robbery for the state to elicit testimony that two months prior to the alleged robbery, the defendant assaulted and threatened to kill the victim of the robbery where the evidence was not used to show identity, intent, motive, common plea or scheme, or guilty knowledge. Bell v. Commonwealth, 404 S.W.2d 462, 2 CLB No. 8, p. 48.

Massachusetts Where testimony indicating that the defendant had been previously arrested for murder was improperly received, the fact that the defendant later testified and would have been subject to impeachment by his prior criminal record did not cure the error. "[W]e can only speculate on whether the defendant would have testified if the officers' testimony had been excluded. Such doubt as we entertain must be resolved in favor of the defendant." Commonwealth v. Nassar, 218 N.E.2d 72, 2 CLB No. 8, p. 48.

Massachusetts The indictment which charged armed robbery, and the defendant's plea of guilty thereto were admissible in evidence in a subsequent felony-murder trial in which the robbery was the underlying felony. Commonwealth v. Chase, 217 N.E.2d 195, 2 CLB No. 7, p. 45.

Minnesota Supreme Court of Minnesota established procedural rules for receipt of testimony of prior similar offenses. State v. Spreigl, 139 N.W.2d 167, 2 CLB No. 2, p. 48.

Mississippi Where defense to "peeping Tom" prosecution was absence of intent, the prosecution was permitted to introduce evidence of other similar offenses to prove motive and intent. Riley v. State, 180 So.2d 321, 2 CLB No. 1, p. 53.

Missouri Prosecutor's repeated reference to and exhibition of two revolvers, neither of which the defendant was tried for possessing, constitutes reversible error, as proof of crimes not charged in the indictment. State v. Holbert, 416 S.W.2d 129, 3 CLB 578.

Nevada Before evidence of a prior similar offense may be received in evidence under one of the exceptions to the general rule, the prosecution must first establish the fact of that offense by "plain, clear, and convincing evidence." Tucker v. State, 412 P.2d 970, 2 CLB No. 5, pp. 15, 27.

South Carolina The defendant's conviction for rape was reversed where the trial judge refused to delete those portions of the defendant's confession in which he admitted to the commission of additional, unrelated crimes. State v. Gamble, 146 S.E.2d 709, 2 CLB No. 4, p. 46.

Texas Conviction of murder with malice was reversed where the defendant was questioned on alleged acts of cruelty to persons other than the victim. DeRamus v. State, 396 S.W.2d 383, 2 CLB No. 2, p. 50.

Vermont Where witness, in response to prosecutor's question as to the length of his acquaintance with the defendant, testified that he knew him "off and on, three years. I met him in prison," defendant is entitled to new trial. Such a response had the effect of putting the defendant's character in issue where the defendant had not chosen to put his character in issue. State v. Shuttle, 230 A.2d 794, 3 CLB 571.

Washington Prejudicial error was com-

mitted by testimony which tended to establish that the defendant might have forged checks other than those charged in the information. Since the other allegedly forged checks were not introduced in evidence, the defendant had no opportunity to negate the claim by cross-examination. State v. Eichman, 418 P.2d 418, 2 CLB No. 10, p. 64.

Washington "We most emphatically do not condone the use of terms like 'mug shot' or 'mug picture' by state witnesses in criminal prosecutions. It would not unduly burden the state were it to instruct its witnesses prior to trial, not to fall into the use of such terms while giving testimony. Besides raising the inference of prior convictions, the voluntary use of such derogatory slang terms is unseemly and should not be permitted." State v. Allen, 431 P.2d 590, 3 CLB 652-53.

Wisconsin It is permissible for state to rebut inference created by cross-examination of arresting and searching officer that no narcotics were found on defendant's premises, even though defendant was on trial for a sale occurring twenty-two hours prior to search. Tobar v. State, 145 N.W. 2d 782, 3 CLB No. 1, p. 52.

§50.05. Proof of other crimes on habitual offender trial

Kentucky Kentucky Court of Appeals declines to depart from its procedure under which a jury is allowed to hear evidence of defendant's former convictions where he is tried as a habitual offender. Cole v. Commonwealth, 405 S.W.2d 753, 2 CLB No. 10, p. 54.

§50.10. Out of court experiments

Court of Appeals, 10th Cir. The results of an out-of-court experiment held admissible at the trial court's discretion. Trial court did not abuse its discretion in excluding the results of such an experiment where experiment was conducted under different conditions. Pacheco v. United States, 367 F.2d 878, 2 CLB No. 10, p. 37.

Georgia Results of lie detector tests held inadmissible in Georgia criminal prosecutions. Salisbury v. State, 146 S.E.2d 776, 2 CLB No. 4, p. 54.

Illinois Even where defendant and prosecutor stipulate to admission of report of polygraph operator, report is not admissible without extensive inquiry as to examiner's qualifications, circumstances under which test was administered and the limitations and possibilities of polygraphic interrogation. People v. Potts, 220 N.E.2d 251, 2 CLB No. 10, p. 58.

New Hampshire Use of alcohol to prepare skin surface for puncturing needle does not render the results of the ensuing blood test inadmissible in prosecution for driving while under the influence of an intoxicating liquor; although the procedure may well affect its reliability, this only goes to the probative value of the test and does not render the results inadmissible. State v. LaFountain, 231 A.2d 635, 3 CLB 655.

New York The failure of the police to publicly file, as required by statute, rules governing the taking of blood does not affect the admissibility of a blood test found by the court in a prosecution for intoxicated driving to be "intrinsically accurate and reliable." People v. Fogerty, 18 N.Y.2d 664, 2 CLB No. 7, p. 48.

North Carolina Where a statute forbids an arresting officer to administer a breathalyzer test to determine the alcoholic content in the defendant's blood, it was reversible error for the court to permit an officer, who administered the test, to testify as to the results thereof and as to his opinion based thereon. State v. Sauffer, 145 S.E.2d 917, 2 CLB No. 3, p. 61.

Oklahoma "We are of the opinion that the Breathalyzer has attained that degree of reliability and accuracy sufficient to render its results admissible in evidence provided that the standards established in *Alexander* v. *State*, 305 P.2d 572 (Okla. Ct. 1956), relating to the admission of such evidence, have been complied with." Penny v. State, 410 P.2d 553, 2 CLB No. 3, p. 61.

Tennessee Results of parrafin test or the refusal to take such a test are not admis-

sible. Clark v. State, 402 S.W.2d 863, 2 CLB No. 7, p. 45.

§50.20. Opinion evidence

Alabama Error for lay witness to testify that complainant was two and one half months pregnant. Drinkard v. State, 189 So.2d 583, 2 CLB No. 9, p. 47.

Arizona Police officer may properly state his opinion as to the defendant's sanity based upon his personal observations. State v. Robinson, 408 P.2d 29, 2 CLB No. 1, p. 54.

Florida It was irrelevant and prejudicial for police officer to testify in prosecution for uttering forged check that, in his opinion, certain scratch marks on the defendant's arm were the result of using heroin. Conviction reversed. Baffuto v. State, 187 So.2d 279, 2 CLB No. 7, p. 47.

Louisiana Testimony by witness that it "ran through her mind" that the defendant might try to kill the victim held to be testimony of state of mind and not opinion evidence. State v. Hamilton, 187 So.2d 417, 2 CLB No. 7, p. 46.

Mississippi The jury could properly determine on the basis of lay witness testimony that the defendant was sane during assault and battery although the defendant was subsequently declared insane by medical experts. Rush v. State, 182 So.2d 214, 2 CLB No. 3, p. 60.

New Mexico Testimony by mathematician that the odds of someone other than the suspect having purchased murder weapon were 240 billion to one was too speculative to be admissible; the validity of the witness' calculations was not sufficiently demonstrated to be received as evidence of guilt. State v. Sneed, 414 P.2d 858, 2 CLB No. 7, p. 45.

Oregon Reversible error for prosecutor to testify as literary expert in obscenity prosecution where his expertise in the field of literature is minimal. State v. Watson, 414 P.2d 337, 2 CLB No. 6, p. 50.

§50.22. Proof of value

Court of Appeals, 4th Cir. In prosecution under 18 U.S.C. 2315 for receiving stolen goods in excess of $5,000, Fourth Circuit holds property is to be evaluated at time and place where goods were stolen. Court also holds that "market value" (under 18 U.S.C. 2311) does not mean retail value or cost to ultimate consumer, and should be given "its normal meaning in a commercial transaction." Tippett and Willis v. United States, 353 F.2d 335, 2 CLB No. 1, p. 44.

§50.25. Stipulations as evidence

Colorado The defendant's willingness to stipulate that the victim died as a result of a gunshot wound in the head and that the death was the result of a criminal act did not preclude the prosecutor from introducing independent evidence of the fact. Kostal v. People, 414 P.2d 123, 2 CLB No. 6, p. 44.

§51.00. Competency

Court of Appeals, 5th Cir. State court's refusal to permit defense witness to testify because of state statute under which his prior conviction for perjury made him incompetent held, under circumstances of case, not a violation of due process. Holman v. Lawhon, 362 F.2d 1, 2 CLB No. 6, p. 43.

§51.08. Attorney for one of the parties as witness

Nevada Where the prosecutor represented to the court that (a) he was surprised that state's witness gave testimony favorable to the defendants, (b) the witness had given the prosecutor contradictory statements prior to trial and (c) he was the only prosecutor available to try the case, it was not an abuse of discretion to permit him to testify to the prior inconsistent statements and to continue the prosecution. Tomlin v. State, 407 P.2d 1020, 2 CLB No. 1, p. 47.

§51.10. Privileged communications

Court of Appeals, 4th Cir. Voluntary disclosure to government by defendant's C.P.A. of contents of C.P.A.'s file including net worth schedules prepared at request of defense counsel in connection with pending tax evasion prosecution re-

quires suppression of the material but does not constitute violation of attorney-client privilege. United States v. Mancuso, 378 F.2d 612, 3 CLB 330.

Court of Appeals, 7th Cir. Where it was undisputed that defendant had sought the advice of his federal parole officer prior to making delivery of narcotics to federal undercover agent (the defendant testified that he believed he was co-operating), refusal of parole officer because of "regulations" to testify as to the subject matter of the discussion was reversible error. United States v. Rhodes, 360 F.2d 865, 2 CLB No. 6, pp. 12, 21.

Illinois When a defendant has a psychiatrist testify in his behalf on the issue of insanity as to certain privileged communications between them, he waives his right to assert the privilege as to conversations had with other psychiatrist called as rebuttal witness by the state on the same issue. People v. Givans, 228 N.E.2d 123, 3 CLB 590.

New York Accidental discovery of contraband in patient's clothing by doctor at city hospital subject to neither physician-patient privilege nor Fourth Amendment restrictions. People v. Capra, 17 N.Y.2d 670, 2 CLB No. 4, p. 57.

§51.15. Duty of court to advise witness of right to counsel and privilege against self-incrimination

Louisiana No duty upon court to inform witness of his right to counsel where he is otherwise informed by the court of his privilege against self-incrimination. State v. Ceaser, 187 So.2d 432, 2 CLB No. 7, p. 51.

§51.18. Witness' assertion of privilege against self-incrimination — effect

Missouri Prosecution witness' assertion of privilege against self-incrimination in presence of jury does not constitute prejudicial error, despite the fact that the witness' counsel informed the court and prosecution that his client would refuse to answer any incriminating questions. The trial court was not required to anticipate any specific questions and rule, in effect, in a vacuum. State v. Yager, 416 S.W.2d 170, 3 CLB 587.

New York Appellate Division Defendant's right to a fair trial violated where he is called to the witness stand by his co-defendant and is forced to claim his privilege in the presence of the jury. People v. Owens, 28 A.D.2d 914, 3 CLB 550, 568.

Wisconsin Where accomplice is called by state as witness and asserts self-incrimination privilege to the prosecutor's surprise, trial court need not, *sua sponte* instruct jury that it should not draw unfavorable inference against defendant from accomplice's invocation of privilege. State v. Yancey, 145 N.W.2d 145, 3 CLB No. 1, p. 67.

§51.20. Expert Witnesses

Alaska Where medical facts upon which opinion is based are within expert witness's personal knowledge, the posing of a hypothetical question was not a necessary prerequisite to the witness's rendering of his expert opinion. McCracken v. State, 431 P.2d 513, 3 CLB 661.

Colorado Medical expert not permitted to testify that his opinion as to the defendant's sanity was based, in part, upon his examination of inadmissible hospital records. Garrison v. State, 408 P.2d 60, 2 CLB No. 1, p. 54.

Georgia A medical witness may not express, either on direct or cross-examination, an opinion regarding the defendant's sanity which is based upon hearsay. Moore v. State, 146 S.E.2d 895, 2 CLB No. 4, p. 52.

Illinois Court holds that adequate psychiatric examination need not conform to any fixed formula of tests and interviews. Basis for psychiatrists' opinions can be explored in cross-examination. People v. Myers, 220 N.E.2d 297, 2 CLB No. 10, p. 55.

Iowa Where the State's medical expert was permitted, in response to a hypothetical question, to testify to his opinion as to the manner in which the deceased was stabbed, and where the opinion was based

upon facts not in evidence, the judgment of conviction was reversed. State v. Tharp, 138 N.W.2d 78, 2 CLB No. 1, p. 53.

§51.25. Informants — Disclosure of identity

Court of Appeals, 3rd Cir. Where informant's testimony would not have been helpful to defense (a fact disclosed by stenographic minutes of trial judge's *in camera* examination of informant) disclosure of his identity was not required. Where informant had disappeared, prejudicial error could not be predicated upon failure to disclose his identity. United States v. Jackson, 384 F.2d 825, 3 CLB 639.

§51.30. Immunity

Court of Appeals, District of Columbia Refusal of trial court to grant immunity to defense witness who has claimed privilege against self-incrimination held not a violation of due process. Earl v. United States, 361 F.2d 531, 2 CLB No. 5, p. 38.

§51.40. Psychiatric examination of witnesses

California Trial court may permit psychiatric examination of prosecutrix and testimony relating to prosecutrix's mental and emotional state in sex prosecution. Ballard v. Superior Court, 410 P.2d 838, 2 CLB No. 4, p. 57.

New Jersey Failure of trial court to compel state's main witness in murder prosecution to comply with its order to undergo psychiatric examinations where the order was entered in response to defense motion does not warrant a reversal; however the case is remanded so that the witness can be examined by the psychiatrist and a hearing conducted where he will report his findings, the court noting that the better practice would have been for the defendant to renew his motion at the time of trial which he failed to do. State v. Franklin, 229 A.2d 657, 3 CLB 437.

Wisconsin Strong and compelling showing necessary before court should condition witnesses being permitted to testify on prior mental examination. State v. Miller, 151 N.W.2d 157, 3 CLB 515.

§51.45. Right to explain absence of witness at trial

Illinois Where it appeared that a detective was one of the first investigating officers to arrive at scene of crime the trial court properly permitted evidence as to the reason for his absence at the trial. People v. Weinstein, 213 N.E.2d 115, 2 CLB No. 2, p. 47.

§52.10. Cross-examination — Right to witness' prior statements — in general

Court of Appeals, 3rd Cir. Third Circuit, in the exercise of its supervisory powers, holds Jencks Act, 18 U.S.C. 3500, applicable to criminal prosecutions in the Virgin Islands. Government of the Virgin Islands v. Lovell, 378 F.2d 540, 3 CLB 334.

New York Where defense witness' prior statement to prosecutor could neither have aided nor have been used in any way by defense counsel, the refusal to require the prosecutor to turn over the statement was not error. People v. Regina and Battista, 19 N.Y.2d 65, 3 CLB 72.

Rhode Island Where prosecution witness testified that he had refreshed his recollection two weeks earlier by examining a report, the trial judge's refusal to order the report produced for defense counsel's use on cross-examination was reversible error. State v. Bradshaw, 221 A.2d 815, 2 CLB No. 9, p. 45.

§52.12. Cross-examination — What are prior statements

Court of Appeals, 7th Cir. The transcribed minutes of witness' testimony in earlier trial of severed co-defendant is not a "statement" in the possession of the United States within the meaning of 18 U.S.C. 3500 (Jencks Act). United States v. Baker, 358 F.2d 18, 2 CLB No. 4, p. 35.

Court of Appeals, 7th Cir. A composite picture of the defendant drawn by an F.B.I. agent by means of descriptions given by the government's two principal witnesses held not to be a witness statement in the possession of the government producible under 18 U.S.C. 3500. United

States v. Zurita, 369 F.2d 474, 2 CLB No. 10, p. 35.

§52.14. Cross-examination — Procedure for acquiring prior statements

Court of Appeals, District of Columbia It is improper to require defense counsel to make his request for Jencks Act witness statements in the presence of the jury. Gregory v. United States, 369 F.2d 85, 2 CLB No. 8, pp. 20, 27.

Illinois Defense is entitled to request production of prior statements of state witnesses outside the presence of the jury. People v. Beard, 214 N.E.2d 577, 2 CLB No. 4, p. 50.

§52.20. Cross-examination — Right to witness' grand jury testimony

United States Supreme Court Trial court's failure to make grand jury minutes available to defense counsel for use on cross-examination held reversible error. Dennis v. U. S., 384 U.S. 855, 2 CLB No. 6, p. 25.

Court of Appeals, District of Columbia Error in refusing defense counsel permission to view grand jury minutes for purposes of cross-examining government's chief witness is sufficiently prejudicial to require a new trial where witness' identification of the defendant is crucial to the case and evidence is far from overwhelming; but court refuses to hold that no prejudice need be shown at all. Worthy v. United States, 383 F.2d 524, 3 CLB 484.

Court of Appeals, 8th Cir. Where grand jury testimony was used to refresh recollections of government witness, defense counsel was entitled to examine minutes without showing of particularized need. National Dairy Products Corp. v. United States of America, 384 F.2d 457, 3 CLB 638.

§52.22. Cross-examination — Procedure for acquiring grand jury minutes

New York A non-indigent defendant "ought to give" reasonable notice to the District Attorney and must bear the cost of transcribing grand jury minutes which he wishes to inspect for purposes of cross-examination. Where, however, the People have secured the grand jury minutes for prosecution purposes, they should be made available to the defense. When an accused is unable to pay the stenographic costs they must be paid by the People. People v. Jaglom, 17 N.Y.2d 162, 2 CLB No. 4, p. 59.

§52.24. Cross-examination — Effect of non-transcription of grand jury minutes

Court of Appeals, 10th Cir. Defendant not entitled to a new trial because of the trial court's failure to order production of the government witnesses' Grand Jury testimony when there was no stenographer present in the Grand Jury room and none of the witnesses' testimony was ever recorded. Although conceding that the case of *Dennis* v. *United States,* 16 L.Ed.2d 973 now makes it "clear that the need for a grand jury testimony as a useful tool of defense is, in most instances, a matter for determination by counsel and not by the Court." Tenth Circuit holds that the absence of the minutes of the Grand Jury proceedings is a clear exception to the *Dennis* rule. Campbell v. United States, 368 F.2d 521, 3 CLB 47.

§52.30. Cross-examination — Impeachment by prior conviction

Court of Appeals, District of Columbia D.C. Circuit sets forth some further observations in connection with its decision in *Luck* v. *United States,* 348 F.2d 763 (1965) (holding that the use of prior convictions to impeach a defendant's credibility was a matter of discretion with the trial court). Gordon v. United States, 383 F.2d 936, 3 CLB 62.

Court of Appeals, 1st Cir. Where, under First Circuit rule, a witness's testimony could be impeached only by a felony or a misdemeanor conviction for an offense having a direct bearing upon truth or veracity, defendant's conviction was reversed, although he had in fact been convicted of the requisite type of misdemeanor, since he only admitted to a lesser

kind, no certified record of conviction was introduced in evidence, and the trial court charged that it might take a "previous conviction of a felony" into consideration in appraising the defendant's veracity. First Circuit notes that "to ask a defendant whether he has had criminal convictions, without possessing a certified copy of the record, is fraught with possibilities of error beyond those that occurred here." Ciravolo v. United States, 384 F.2d 54, 3 CLB 638.

§52.35. Cross-examination — Nature of conviction

Court of Appeals, District of Columbia The term "crime" as used in the section of the District of Columbia code allowing impeachment of a witness by reason of his having been convicted of a crime does not include petty offenses such as vagrancy, disorderly conduct, etc. to which the right of trial by jury does not apply. Pinkney v. U. S., 363 F.2d 696, 2 CLB No. 7, p. 36.

Court of Appeals, 10th Cir. Use of prior juvenile delinquency adjudication to impeach defendant's credibility held error. Cotton v. United States, 355 F.2d 480, 2 CLB No. 2, p. 45.

Illinois A court-martial conviction may be used to impeach a witness' credibility so long as it satisfies the normal Illinois requirement that it be for an "infamous crime." People v. Helm, 227 N.E.2d 792, 3 CLB 589.

Kansas City Use of prior conviction for violating municipal ordinance is improper method of impeaching defendant's credibility since it is not a conviction for a crime and thus prejudiced the defendant, and requires the granting of a new trial. Kansas City v. Roberts, 411 S.W.2d 847, 3 CLB 346.

§52.37. Cross-examination — Defendant's right to explain

North Carolina It is prejudicial error for court to prevent the defendant, who has admitted to nine convictions on cross-examination, from testifying that those convictions had been reversed on appeal, and that the charges were then dropped or he was acquitted on the retrial. State v. Calloway, 150 S.E.2d 517, 3 CLB 51.

§52.40. Cross-examination — Impeachment by prior inconsistent statement

Court of Appeals, 5th Cir. Government may not impeach its own witness by a prior statement where it knew sixteen days in advance of trial that adverse testimony would be given. Hooks v. United States, 375 F.2d 212, 3 CLB 244, 257.

Court of Appeals, 10th Cir. Prior inconsistent statements used merely to impeach must nevertheless meet *Miranda* requirements. "While it is true that the Court in *Miranda* was concerned with the admissibility of custodial statements as substantive proof of the facts related, we think the procedural safeguards prescribed there are equally important to a consideration of the admissibility of prior inconsistent statements for impeachment purposes. If the veracity of an accused person testifying in his own behalf is to be attacked by a prior inconsistent or contradictory statement made while he was under in-custody interrogation, we think it reasonable to require the Government to meet the burden of showing that the statement was voluntarily made after the accused had been fully advised of all of his rights and has effectively waived them in accordance with the standards prescribed by *Miranda*. To hold otherwise would permit an unconstitutional invasion of an individual's right to be used as a weapon to influence the jury's consideration of his trial testimony." Wheeler v. United States, 382 F.2d 998, 3 CLB 640-41.

Maryland Witness' prior inconsistent statement has no independent probative value on the issue of guilt or innocence. Green v. State, 220 A.2d 544, 2 CLB No. 8, p. 48.

New York New York Court of Appeals holds that statements taken in violation of Defendant's Fifth and Sixth Amendment rights may be received in evidence to impeach credibility. People v. Kulis,

18 N.Y.2d 318, 2 CLB No. 9, p. 44.

§52.50. Cross-examination — Impeachment for bias or motive

Illinois Witness may be examined with respect to arrest for disorderly conduct where fact of arrest is relevant on question of her motive to falsify testimony. People v. Beard, 214 N.E.2d 577, 2 CLB No. 4, p. 50.

§52.60. Cross-examination — Impeachment for prior illegal or immoral acts

Oklahoma A prosecutor may not cross-examine a defendant as to her previous assertion of the privilege against self-incrimination. Massier v. State, 428 P.2d 338, 3 CLB 512.

§52.70. Cross-examination — Impeachment where issue not raised on direct examination

Illinois Where defendant does not raise issue of his capacity to form requisite intent during case-in-chief, impeachment evidence on that issue during surrebuttal is improper. People v. Triplett, 213 N.E.2d 290, 2 CLB No. 3, p. 59.

Oklahoma Where defendant at the time of his arrest for possessing narcotics had in his possession a newspaper clipping describing his unrelated arrest for robbery, defense counsel's repeated questioning of the arresting officer as to what was found in defendant's possession at the time of arrest was held to have "invited" the officer's testimony concerning the robbery. The trial court properly refused to grant a mistrial where it was clear that defense counsel knew of the newspaper clipping. Kelly v. State, 415 P.2d 187, 2 CLB No. 7, p. 45.

§52.80. Cross-examination — Impeachment on collateral issue

Court of Appeals, District of Columbia Where the defendant, on cross-examination by the government denies the commission of certain crimes (on which charges had earlier been dismissed), the government could not on rebuttal, introduce independent evidence of the crimes for impeachment purposes. Lee v. United States, 368 F.2d 834, 2 CLB No. 10, pp. 24, 44.

§54.00. Alibi — in general

Iowa Iowa court reaffirms rule that burden of proof on defense of alibi rests with the accused, but four of nine members of court would now hold that state must prove beyond a reasonable doubt that defendant was present at time and place crime is alleged to have been committed. State v. LaMar, 151 N.W.2d 496, 3 CLB 503.

§54.02. Alibi — Notice requirement

Arizona Trial court did not abuse discretion in refusing to permit testimony of alibi witnesses where defendant failed to give statutory notice of intent to rely upon alibi. State v. Dodd, 418 P.2d 571, 2 CLB No. 10, p. 46.

Pennsylvania Trial court committed error in excluding testimony of alibi witnesses solely because the defendant's statutory notice of intent to use an alibi defense was not "personally signed by the defendant" as required by statute where the notice conformed to all the other statutory requirements in listing the place where the defendant allegedly was at the time of the commission of the crime and the names and addresses of the witnesses he intended to call as alibi witnesses. Commonwealth v. Gonzales, 231 A.2d 414, 3 CLB 569.

§54.05. Abatement

New York District Court Prosecution for possession of contraceptive device held not to abate by amendment of statute which legalized such possession. People v. Baird, 265 N.Y.S.2d 264, 2 CLB No. 2, p. 59.

§54.08. Alcoholism

Washington Habitual alcoholism is no defense to a crime resulting directly from such affliction, although evidence of intoxication at a particular time may be used to prove the absence of a required intent. State v. Shelton, 431 P.2d 201, 3 CLB 649.

§54.10. Collateral estoppel

Court of Appeals, 4th Cir. Taxpayer who has been convicted for tax evasion is collaterally estopped in subsequent civil suit for fraud penalty from denying that he was guilty of fraud during years in question. Moore v. United States, 360 F.2d 353, 2 CLB No. 1, p. 34.

New Jersey Doctrine of collateral estoppel precludes prosecution for substantive offense of larceny where the acts upon which the larceny charge was based were alleged as overt acts in the conspiracy charge and the defendant was acquitted of that charge. The record of the conspiracy trial clearly indicated that the issue of defendant's fraud was decided against the State. State v. Cormier, 218 A.2d 138, 2 CLB No. 5, p. 43.

§54.20. Double jeopardy – in general

Florida Where the defendants were acquitted of larceny from the "Curtiss National Bank" they could not be reprosecuted for the same larceny from the bank's bailee or custodian. Wilcox v. State, 183 So.2d 555, 2 CLB No. 4, p. 49.

North Carolina Where a prisoner's petition only requests a release from custody and, the court instead grants him a new trial, the subsequent trial violates his constitutional right not to be placed in jeopardy twice for the same crime. State v. Case, 150 S.E.2d 509, 3 CLB No. 1, p. 49.

South Dakota Where a conviction has been reversed and a new trial granted the protection against double jeopardy is inapplicable. State v. Percy, 137 N.W.2d 888, 2 CLB No. 1, p. 52.

§54.25. Double jeopardy – Separate and distinct offenses

Court of Appeals, 9th Cir. Where defendant, found guilty of passing a bad check, served four months "in the road camp" as a condition of probation and thereafter violated his probation, the court's sentencing him, upon revocation of probation, to a felony sentence in state prison did not constitute double jeopardy. Petersen v. Dunbar, 355 F.2d 800, 2 CLB No. 2, p. 37.

Arizona Acquittal of robbery charge held not a bar to subsequent perjury prosecution arising out of defendant's testimony given at robbery trial. State v. Noble, 410 P.2d 489, 2 CLB No. 3, p. 63.

Colorado Where local ordinance provides that a person addicted to narcotics is guilty of disorderly conduct the defendant may be convicted under both the ordinance and statute which interdicts possession of narcotics. Double jeopardy defense unavailable since the two offenses are separate and distinct. Casias v. People, 415 P.2d 344, 2 CLB No. 8, p. 45.

Florida Acquittal on "hit and run" charge does not bar prosecution for manslaughter arising out of same incident. Busbee v. State, 183 So.2d 27, 2 CLB No. 4, p. 54.

Massachusetts Defendant charged with murder cannot claim double jeopardy on the basis of his plea of guilty to assault at a time when the victim was still alive. Commonwealth v. Vanetzian, 215 N.E.2d 658, 2 CLB No. 5, p. 47.

Texas Information charging willful injury to automobile of one named person and acquittal because of an "instructed verdict not guilty – ownership in the wrong person" does not give rise to defense of double jeopardy where defendant is subsequently charged and convicted for injuring the property of the true owner of the car. Smotherman v. Texas, 415 S.W.2d 430, 3 CLB 503.

Texas A probation hearing to determine whether the defendant committed a particular assault and thus violated his probation does not constitute jeopardy so as to prevent him from being prosecuted for the assault. Settles v. Texas, 403 S.W.2d 417, 2 CLB No. 7, p. 44.

§54.30. Double jeopardy – Dual sovereignty doctrine

Kansas Defendant's conviction under city ordinance of carrying concealed weapon held not to bar subsequent prosecution under state statute prohibiting possession of pistol after conviction of felony. Barwood v. State, 426 P.2d 151, 3 CLB 347.

§54.40. Double jeopardy – Implied acquittal

Maryland Maryland Court of Appeals adopts federal double jeopardy rule established in *Green* v. *United States*, 355 U.S. 184. Defendant found guilty of second degree murder under indictment charging murder in first degree may be retried only for second degree murder after successful appeal. State v. Barger, 220 A.2d 304, 2 CLB No. 7, p. 44, 2 CLB No. 8, p. 45.

New York Where jury in trial for common law and felony murder was instructed to return verdict with respect to only one or the other (if guilty), its verdict of guilty on the common law murder count was not an implied acquittal of felony murder for purposes of double jeopardy rule. People v. Jackson, 20 N.Y.2d 440, 3 CLB 650.

New York New York Court of Appeals holds that retrial of defendant on greater degree of crime where conviction for lesser degree has been reversed on appeal violates double jeopardy provision of Federal constitution. People v. Ressler, 17 N.Y.2d 174, 2 CLB No. 4, p. 48.

§54.55. Double jeopardy – Mistrials as a basis for double jeopardy – in general

Nevada Where a juror revealed during the deliberations that he had personal information prejudicial to the defendant which he conveyed to the other jurors, the trial court should have permitted counsel to *voir dire* the juror. The trial court's declaration of mistrial without such *voir dire* was error. A writ of prohibition based upon a claim of double jeopardy under the state statute was sustained (NRS 175.310). Wheeler v. Second Judicial District Court, 415 P.2d 63, 2 CLB No. 7, p. 44.

§54.60. Double jeopardy – Point at which jeopardy attaches

Court of Appeals, 9th Cir. Dismissal of an empaneled jury prior to the taking of any testimony only results in double jeopardy where the defendant can show an abuse of discretion on the part of the trial court. Oelke v. United States, 389 F.2d 668, 3 CLB 550, 568.

Massachusetts Double jeopardy defense unavailable to defendant whose case is dismissed in lower court prior to trial solely because of favorable result on motion to suppress. Commonwealth v. Ballou, 217 N.E.2d 187, 2 CLB No. 7, p. 56.

Ohio State may appeal trial court's dismissal of indictment after trial had commenced on grounds of denial of speedy trial. Reprosecution of defendant following reversal of trial court's ruling on appeal not barred by double jeopardy clause. State v. Doyle, 228 N.E.2d 863, 3 CLB 588.

Pennsylvania An acquittal by a coroner's jury does not bar subsequent prosecution for murder. Commonwealth ex rel. Wilkes v. Maroney, 222 A.2d 856, 2 CLB No. 10, p. 51.

Tennessee There is no merit to a claim of double jeopardy where the first court proceeding is void because of a lack of jurisdiction over the subject matter. Tennessee ex rel. Austin v. Johnson, 404 S.W. 2d 244, 2 CLB No. 8, p. 45.

§54.62. Double jeopardy – Reason for granting mistrial

Court of Appeals, District of Columbia Trial court's declaration of a mistrial after jury reported it was "deadlocked on the lack of evidence" and needed "more conclusive evidence . . . to bring about a full vote" did not place defendant in jeopardy so as to bar second trial. Trial judge may, as a matter of discretion declare mistrial where jury vote is revealed. Mullin v. United States, 356 F.2d 368, 2 CLB No. 2, p. 36.

California Declaration of mistrial where jury would not agree on verdict did not bar subsequent first degree murder charge simply because first jury was deadlocked ten for acquittal and two for second degree murder. Reo v. Griffin, 426 P.2d 507, 3 CLB 347.

North Carolina Double jeopardy claim was unavailable where trial judge de-

cleared a mistrial due to the illness of one of the defendant's attorneys. State v. Battle, 148 S.E.2d 599, 2 CLB No. 7, p. 44.

Pennsylvania Where the defendant's request for a mistrial based upon the prosecutor's improper comments was granted, the subsequent claim of double jeopardy was rejected. The court noted, however, that had the prosecutor deliberately attempted to secure a mistrial because of the uncertainty of conviction a different result might have been reached. Commonwealth ex rel. Montgomery v. Meyers, 220 A.2d 859, 2 CLB No. 8, p. 45.

Tennessee Declaration of a mistrial after the submission of the case to the jury because one of the jurors is related to one of the defendant's character witnesses does not support a plea of double jeopardy. Jones v. Tennessee, 403 S.W.2d 750, 2 CLB No. 8, p. 45.

§54.64. Entrapment – in general

Court of Appeals, 1st Cir. First Circuit sets forth new guide-lines for the defense of entrapment. Kadis v. United States, 373 F.2d 370, 3 CLB 142, 180-81.

Court of Appeals, 1st Cir. First Circuit reduces defendant's initial burden in entrapment cases. Defendants who were local bookmakers were not entrapped as a matter of law when they were induced by government agent to accept his interstate wagers. Sagansky v. United States, 358 F.2d 195, 2 CLB No. 4, p. 35.

Court of Appeals, 9th Cir. Ninth Circuit reaffirms rule that defendant who denies having made sale of narcotics is not entitled to raise defense of entrapment. Ortiz v. United States, 358 F.2d 107, 2 CLB No. 4, p. 37.

Florida Defense of entrapment sustained where, after defendant's arrest for "moonshining," he was permitted to act as undercover agent for liquor authorities. Despite the fact that the agents told the defendant not to engage in further moonshining, the evidence established that they induced the defendant's active participation in the illegal activity. Thomas v. State, 185 So.2d 745, 2 CLB No. 6, p. 44.

New York A defendant who on a number of occasions had been told by the Department of Markets that he did not need a license to sell scorecards outside of the Yankee Stadium was denied due process of law when he was subsequently tried and convicted for the unlicensed selling of such scorecards. People v. Markowitz, 18 N.Y.2d 953, 3 CLB 50.

Oregon That the defendant was not previously suspected of criminal activity is only one factor in considering entrapment defense; it does not establish the defense as a matter of law. State v. LeBrun, 419 P.2d 948, 3 CLB 50.

§54.68. Entrapment – Burden of proof

Court of Appeals, 9th Cir. Once defense of entrapment is raised, burden of proof is upon prosecutor to establish lack of entrapment beyond reasonable doubt. Notaro v. United States, 363 F.2d 169, 2 CLB No. 7, p. 33.

§54.69. Immunity from prosecution

United States Supreme Court Article I, §6 of the Federal Constitution (the Speech or Debate Clause) which provides that "for any speech or debate in either House, they [Senators and Representatives] shall not be questioned in any other Place" prevents congressman's floor speech from being made basis for federal criminal prosecution charging conspiracy with others to defraud the Federal government. United States v. Johnson, 383 U.S. 169, 2 CLB No. 3, p. 43.

Arizona A promise of immunity from prosecution from a prosecuting attorney is enforceable only if it is in exchange for a promise on the part of the accused to turn state's evidence. Application of Porham, 431 P.2d 86, 3 CLB 654.

Florida Prosecutor's promise not to prosecute a defendant for murder if the results of a polygraph test establish his innocence held to be binding on state, and requires a dismissal of the indictment. Florida v.

Davis, 188 So.2d 24, 2 CLB No. 8, p. 51.

§54.80. Insanity – Substantive tests

Court of Appeals, 2nd Cir. Second Circuit abandons M'Naghten rule; adopts American Law Institute rule that "a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." United States v. Charles Freeman, 357 F.2d 606, 2 CLB No. 3, p. 45.

§54.85. Insanity – Right to separate trial on issue of insanity

Court of Appeals, District of Columbia D.C. Circuit Court of Appeals lays down guide-lines to be applied in the District Court in determining when to grant a defendant a bifurcated trial on the separate issues of guilt and insanity. Holmes v. United States, 363 F.2d 281, 2 CLB No. 6, p. 38.

§54.88. Insanity – Scope of separate trial

Georgia A plea of insanity, tried by a special jury pursuant to state statute, is a civil proceeding. The state may call the accused for purpose of examining him with respect to the issue of his sanity. However, no questions concerning his guilt or innocence may be propounded. Bacon v. State, 149 S.E.2d 111, 2 CLB No. 8, p. 49.

§54.90. Insanity – Burden of proof

Court of Appeals, 9th Cir. The government failed to meet its burden of proving the defendant sane beyond a reasonable doubt where the defense called two well-qualified psychiatrists who testified that defendant was insane. Their testimony was substantially unimpeached, and the government produced no medical testimony to the contrary. Hartford v. United States, 362 F.2d 63, 2 CLB No. 6, p. 31.

Court of Appeals, 10th Cir. Question of whether defense has overcome presumption of sanity is for trial judge. Evidence as to defendant's mental condition subsequent to commission on crime is relevant on the defense of insanity. Davis v. United States, 364 F.2d 572, 2 CLB No. 8, pp. 20, 27.

§55.00. Insanity – Lay testimony

Illinois Where defendant's psychiatric testimony indicates insanity, but state's lay witness testimony supports verdict of sanity, defendant is not entitled to directed verdict of not guilty by reason of insanity if lay evidence has adequate foundation. Peo v. Wax, 220 N.E.2d 600, 3 CLB No. 1, p. 56.

§55.10. Insanity – Defense interposed over defendant's objection

Court of Appeals, District of Columbia Insanity defense interposed by counsel over defendant's objection vitiates commitment following acquittal by reason of insanity. Rouse v. Cameron, 387 F.2d 241, 3 CLB 557.

§55.30. Insanity – Commitment following acquittal

New Jersey Mere finding that criminal defendant was an imbecile was not sufficient to justify commitment; trial judge should have permitted proof that defendant was a hazard to himself or others. State v. Caralluzzo, 228 A.2d 693, 3 CLB 346.

New York Statute providing for automatic commitment after verdict of acquittal by reason of insanity held constitutional. Defendant entitled to jury trial on application for release or transfer to civil hospital. People v. Lally, 19 N.Y.2d 27, 3 CLB 56.

§55.60. Lack of jurisdiction

Court of Appeals, 9th Cir. 18 U.S.C. 1464, which prohibits the uttering of any obscene, indecent, or profane language by means of radio communication applies to citizens' band radio communications even where it is not proven that the transmission crossed state lines. Gagliardo v. United States, 366 F.2d 720, 2 CLB No. 9, p. 30.

Court of Appeals, 10th Cir. Army court-martial had jurisdiction to try German national for lewd and lascivious acts committed in Germany upon German children where defendant was in Germany as a member of the U.S. Army. (He had earlier filed a declaration of intention to become a U.S. citizen) and the German civil authorities waived its right to exercise primary jurisdiction. Writ of habeas corpus denied. Puhl v. United States, 376 F.2d 194, 3 CLB 330.

Minnesota Defendant's arrest by Canadian police and his border delivery to Minnesota authorities without complying with extradition procedures required by treaty may have been a violation of federal law but did not deprive state authorities of jurisdiction to try him for local crime. State v. Porter, 144 N.W.2d 260, 2 CLB No. 8, p. 49.

Montana State has criminal jurisdiction over land purchased for use as federal air force base where there is no conflict between state and federal authorities. State murder prosecution of air force personnel for murder occurring within confines of federal property held jurisdictionally valid. State v. District Court of Eighth Judicial District, 410 P.2d 459, 2 CLB No. 3, p. 61.

New Jersey In view of interstate agreement providing for concurrent jurisdiction, a defendant who was involved in an accident on a bridge connecting Pennsylvania and New Jersey could be prosecuted for intoxicated driving in either state. State v. Holden, 217 A.2d 132, 2 CLB No. 4, p. 47.

New York Crime of taking unlawful fees by Nassau County public official was committed in Nassau County and New York County had no jurisdiction. People v. Kohut, 17 N.Y.2d 705, 2 CLB No. 4, p. 47.

§55.65. "Procuring agent" defense

Court of Appeals, 7th Cir. Defendant charged under 21 U.S.C. 174 with facilitating the sale of narcotics is not entitled to assert the defense of "procuring agent" on the theory that, in securing the narcotics, he was acting solely as a purchasing agent of the government informer. United States v. Simons, 374 F.2d 993, 3 CLB 40.

§55.80. Self-defense – in general

Arizona Where a wife kills her former husband in the course of resisting a simple assault, the homicide is not justifiable, notwithstanding one state statute which makes all assaults by a man upon a woman felonies and a second statute which provides that homicides are justifiable when committed in the course of resisting the commission of a felony. State v. Copley, 418 P.2d 579, 2 CLB No. 10, p. 55.

§55.90. Self-defense – Right to resist an illegal arrest

Montana Defendant's shooting of police officers who were attempting to enter his hotel room to investigate a complaint could not be justified as the use of reasonable force to resist a trespass. State v. Lukus, 423 P.2d 49, 3 CLB 142, 180.

New Jersey New Jersey intermediate appellate court abolishes the common-law right to forcibly resist arrest by an officer. New rule to be applied prospectively. State v. Koonce, 214 A.2d 428, 2 CLB No. 1, p. 46.

New York That arrest warrant valid on its face was subsequently declared insufficient was not a defense to assault charge based upon resistance to "lawful process or mandate" of the court. People v. Briggs, 19 N.Y.2d 37, 3 CLB 48.

New York Appellate Division Acquittal on traffic charges does not justify dismissal of indictment charging defendant with assault on the police officer who issued summons where Grand Jury minutes show that no arrest was ever contemplated at time of assault. People v. Adamo, 266 N.Y.S.2d 586, 2 CLB No. 3, p. 66.

Texas Where defendant grabbed law officer around the waist to prevent further assaults by the officer upon defendant his conviction for aggravated assault was improper. Gordon v. State, 396 S.W.2d 880, 2 CLB No. 2, p. 46.

§56.00. Self-defense – Threats by victim

California Trial court erred in refusing to permit defense witnesses in homicide prosecution to testify that the deceased had assaulted them and that they had reported that fact to the defendant. Error held harmless where defendant had introduced substantial evidence of deceased's violent character and where defendant was permitted himself to testify to the reports of the witnesses. People v. Davis, 408 P.2d 129, 2 CLB No. 1, p. 53.

Colorado Victim's prior uncommunicated threats against accused admissible to show victim's state of mind although accused had not submitted prior evidence of self-defense. Sowards v. People, 408 P.2d 441, 2 CLB No. 2, p. 47.

§56.20. Statute of limitations

Court of Appeals, 5th Cir. Six year statute of limitations on prosecutions for filing fraudulent income tax returns measured not from actual date of filing return but from due date thereof. Prosecution commenced within 6 years of filing return (as a result of extensions granted the taxpayer) but not within normal due date, held barred. Hull v. United States, 356 F.2d 919, 2 CLB No. 3, p. 54.

Court of Appeals, 8th Cir. Prosecution for abduction while committing a bank robbery not barred by five year statute of limitations even though court did not impose death sentence. Test is whether death penalty may have been imposed for crime as charged. Coon v. U. S., 360 F.2d 550, 2 CLB No. 6, p. 42.

California Where petitioner's conviction for second degree murder was reversed, and retrial resulted in manslaughter conviction which was also reversed petitioner could be retried for manslaughter despite the fact that 3 year statute of limitations for manslaughter prosecution had run. Original indictment charging murder also charged lessor included offense of manslaughter. Petitioner could be retried on original indictment. In re McCartney, 415 P.2d 782, 2 CLB No. 8, p. 56.

§56.35. Unconstitutionality of statute or ordinance – Equal protection

Court of Appeals, 5th Cir. The fact that the federal government exempts certain religious users of peyote from prosecution, while refusing such exemption as to marijuana, does not constitute an arbitrary or invidious discrimination. Leary v. United States, 383 F.2d 851, 3 CLB 556.

§56.38. Unconstitutionality of statute or ordinance – Improper exercise of police power

Illinois Making it a crime to sell non-narcotic substance under representation that it is a narcotic is reasonably related to state's power to suppress narcotics trade and is not an improper exercise of police power. People v. Calcaterra, 213 N.E.2d 270, 2 CLB No. 3, p. 61.

§56.40. Unconstitutionality of statute or ordinance – Violation of First Amendment

Court of Appeals, 2nd Cir. New federal statute prohibiting the destruction of draft cards held constitutional. Burning of draft card at street rally protesting Viet Nam war held not to be symbolic speech protected by the First Amendment guarantee. United States v. Miller, 367 F.2d 72, 2 CLB No. 9, p. 37.

Court of Appeals, 5th Cir. Persons using marijuana as an integral part of their religion are not protected by the free exercise clause of the First Amendment from federal prosecution for trafficking in narcotics. Leary v. United States, 383 F.2d 851, 3 CLB 556.

New York Conviction for criminal anarchy upheld by court's reinterpretation of statute which, under earlier interpretation would have been held unconstitutional under decisions of Supreme Court. People v. Epton, 19 N.Y.2d 496, 3 CLB 345.

North Carolina Conviction for illegal possession of marijuana and peyote upheld over defendant's claim that use of these substances was a necessary part of his religion and therefore protected by the First Amendment. Court distinguished between

beliefs, all of which are protected and practices, which may be subject to reasonable limitations. State v. Bullard, 148 N.E. 2d 565, 2 CLB No. 7, pp. 10, 28.

§56.42. Unconstitutionality of statute or ordinance – Obscenity

New York New York Court of Appeals upholds power of state to enact legislation which bars sale to minors of material which is not obscene if sold to adults. Bookcase v. Broderick and Hogan, 18 N.Y. 2d 71, 2 CLB No. 7, p. 49.

New York The New York Court of Appeals upholds constitutionality of Penal Law Section 484-i which proscribes the sale of publications deemed obscene for children under 18 years of age. People v. Tannenbaum, 18 N.Y.2d 268, 2 CLB No. 9, p. 52.

§56.45. Unconstitutionality of statute or ordinance – Void for vagueness

United States Supreme Court Pennsylvania statute allowing jury in its discretion to impose court costs on acquitted defendant is unconstitutional for vagueness. Giaccio v. Pennsylvania, 382 U.S. 399, 2 CLB No. 2, p. 33.

United States Supreme Court Common law criminal libel is unconstitutionally vague where it permits conviction based on tendency of writing to provoke breach of peace. Ashton v. Kentucky, 384 U.S. 195, 2 CLB No. 5, p. 30.

Court of Appeals, 2nd Cir. Title 18, United States Code §201 (f) which prohibits anyone from giving anything of value to a public official "for or because of any official act performed or to be performed by such public official . . ." held not unconstitutionally vague on its face. United States v. Irwin, 354 F.2d 192, 2 CLB No. 1, p. 44.

Court of Appeals, 8th Cir. Statute not void for vagueness where language clearly prohibits certain acts even though administrative agency has policy of not prosecuting for minimal violations. Dean Rubber Manufacturing Co. v. United States, 356 F.2d 161, 2 CLB No. 3, p. 54.

Florida A Florida statute which makes it illegal to accept compensation for the placement of a child for adoption, but which authorized reasonable charges for legal services rendered in connection therewith held void for vagueness. State v. Buchanan, 191 So.2d 33, 3 CLB 71.

Nebraska "Any person or persons who shall operate a vehicle upon any highway in such a manner as to (1) endanger the safety of others or (2) cause immoderate wear or damage to the highway shall be deemed guilty of a misdemeanor . . ." The above statute was declared unconstitutional in that it "fail[ed] to prescribe an ascertainable standard of guilt." State v. Adams, 143 N.W.2d 920, 2 CLB No. 8, p. 44.

New York New York Vehicle and Traffic Law requiring adequate muffler on motor vehicles found sufficiently definite and certain. Statute not a denial of equal protection. People v. Byron, 17 N.Y.2d 64, 2 CLB No. 3, p. 67.

New York Section 483 of the N.Y. Penal Law (Impairing morals – endangering health of minor) held not unconstitutionally vague. Evidence that minor was killed in traffic accident as a result of intoxication held admissible. People v. Bergerson, 17 N.Y.2d 398, 2 CLB No. 6, p. 54.

Washington State loitering statute held unconstitutionally vague. The term "loiter" may imply wholly innocent conduct. City of Seattle v. Drew, 423 P.2d 522, 3 CLB 143, 181.

§57.00. "Allen" dynamite charge

Court of Appeals, 3rd Cir. Where trial was short (2 witnesses) and facts were uncomplicated, trial judge's "Allen" charge to jury during the course of his main charge that "a juror should listen with deference to his fellow jurors and with distrust of his own judgment if he finds the large majority of jurors take a different view from that which he or she takes" held improper. U. S. v. Meisch, 370 F.2d 768, 3 CLB 42.

Court of Appeals, 6th Cir. It was "plain

error" for trial judge, in response to inquiry from deadlocked jury, to state that it could recommend leniency if a guilty verdict were returned. Davidson v. United States, 367 F.2d 60, 2 CLB No. 9, p. 30.

Court of Appeals, 10th Cir. Trial judge's urging jury to reach a verdict by a fixed time held coercive and an unwarranted invasion of the jury's fact-finding province. Burroughs v. United States, 365 F.2d 431, 2 CLB No. 9, p. 28.

Kansas Supreme Court of Kansas suggests that "Allen" charge preferably be given at time of original charge. "If so given, all questions with regard to the coercive effect of the same would be removed." State v. Oswald, 417 P.2d 261, 2 CLB No. 9, p. 22.

Kansas After a full day's deliberation without a verdict, it is error to instruct a jury that the lengthy and expensive trial will have to be repeated, and the judge, the reporter, the prosecutor, the jurors themselves, and even court-appointed counsel will have to be paid twice if no verdict is rendered. State v. Earsery, 428 P.2d 794, 3 CLB 505.

North Carolina "Allen" charge held inadequate where it failed to include a statement that no juror should surrender his conscientious conviction and judgment merely to agree with the majority. State v. Roberts, 154 S.E.2d 536, 3 CLB 398, 410.

§57.05. Accomplice testimony

Arizona Where the prosecution's principal witness was an accomplice, it was reversible error, even though no request had been made, for the trial judge to fail to charge the jury that his testimony had to be corroborated. State v. Owen, 415 P.2d 907, 2 CLB No. 8, pp. 19, 27.

Michigan Where accomplice who has already pleaded guilty but has not been sentenced testifies for state against defendant, trial court is not required to instruct jury that accomplice has a particular interest in the outcome of the trial. Nothing other than a standard accomplice charge is required. People v. Sawicki, 145 N.W. 2d 236, 2 CLB No. 10, p. 46.

New York Appellate Division Trial court erred in refusing to give instruction on corroboration of accomplice's testimony. People v. Smith, 26 A.D.2d 588, 2 CLB No. 8, p. 42.

New York It is reversible error for trial court to refuse to charge the jury as to the statutory requirement of corroboration for accomplice testimony where two defendants are tried jointly and only one testifies in his own behalf, implicating his co-defendant. People v. Diaz, 19 N.Y.2d 547, 3 CLB 341.

South Dakota The trial court properly treated the issue of whether the state's witness was an accomplice as one of fact for the jury. Court disapproves giving of pre-trial instructions. State v. Johnson, 139 N.W.2d 232, 2 CLB No. 2, p. 52.

§57.10. Burden of proof

Missouri Court's failure to charge jury that they must acquit if they do not find state has established the defendant's guilt beyond a reasonable doubt requires reversal despite the fact that the court had charged the jury on the defense of alibi, since jury, on the facts in the case, could either have found that the defendant was not present when the crime was committed, or if present, that she did not commit the crime. State v. Murphy, 415 S.W.2d 758, 3 CLB 581.

New York Appellate Division Trial judge's statement to jury that "if you feel that these officers framed this defendant . . . , throw it out, find him not guilty" held improper as implying that jury should convict unless they found a "frame-up." People v. Roberts, 26 A.D.2d 655, 2 CLB No. 9, p. 24.

North Carolina It was reversible error for the trial court to charge that, "the defendant is not required to satisfy you of any right of self-defense beyond a reasonable doubt. The only thing he is required to do is to satisfy this jury that what he did was in self-defense of himself." A defendant charged with assault does not have

the burden of proving that he acted in self-defense. State v. Cloer, 146 S.E.2d 815, 2 CLB No. 4, p. 45.

§57.15. Burglary

New York Appellate Division It was reversible error for trial court to charge that going through a window that has its glass missing, with criminal intent, is a breaking and entering within meaning of burglary statute. People v. Wissler, 28 A.D.2d 918, 3 CLB 581.

Connecticut "Nighttime," as term is used in common law burglary, is when there is not sufficient daylight left to discern another's features. Where burglary may have occurred after sundown but within the twilight period, it was reversible error for trial judge to charge jury that "another accepted definition is the time between the sunset of one day and the daylight of the next." State v. Bell, 219 A.2d 218, 2 CLB No. 6, p. 49.

§57.20. Character evidence

Court of Appeals, 10th Cir. *Edgington* v. *United States,* 164 U.S. 361 and *Michaelson* v. *United States,* 335 U.S. 49 do not compel the giving of a charge that evidence of good character may "standing alone" be sufficient to generate a reasonable doubt in every case in which evidence of good character has been admitted. They merely hold that the circumstances of a particular case may require it (such as where an accused's entire defense was based upon evidence of good character coupled with the prosecution's claimed failure of proof). Oertle v. United States, 370 F.2d 719, 3 CLB 39-40.

Tennessee Error for trial judge to fail to charge jury that testimony of character witnesses is admitted both for the purpose of strengthening the defendant's credibility as a witness, and strengthening the presumption of innocence. The appeal was reversed on this ground, despite defense counsel's failure to request such a charge. Roder v. Tennessee, 404 S.W.2d 487, 2 CLB No. 8, p. 50.

§57.30. Charges unsupported by evidence

California Where the facts indicated that the robbery had terminated prior to the killing, the trial court should have charged the jury that as a matter of law it could not convict of felony-murder. Since the killing occurred in the course of a kidnapping it was not error for the trial court to refuse to charge manslaughter. Killing was at least second degree murder under applicable felony – murder-second degree statute. People v. Ford, 416 P.2d 132, 2 CLB No. 8, p. 48.

§57.35. Circumstantial Evidence

Arizona "Circumstantial evidence" charge held incorrect where it failed to state that to be sufficient to convict, it must be consistent with guilt and inconsistent with every other reasonable hypothesis of innocence. State v. Valenzuela, 425 P.2d 127, 3 CLB 245, 258.

§57.42. Credibility of witnesses – in general

Court of Appeals, 7th Cir. Where defense summation in narcotics sale prosecution was based on theory that agents were honestly mistaken in their identification of defendants, and prosecution summation was based on argument that "someone is lying," trial court's charge that case "bristles with issues of veracity" was reversible error in effectively removing defense theory from consideration by the jury. United States v. Dichiarinte, 385 F.2d 333, 3 CLB 639.

Court of Appeals, 7th Cir. Refusal to give specific instruction that government witness's prior felony conviction should be considered in weighing his credibility was not reversible error where court gave general instruction that jury should consider all the facts and circumstances in determining witness's credibility. United States v. Garafolo, 385 F.2d 200, 3 CLB 645.

Georgia Where state's only witness in prosecution for possession and sale of nontax-paid liquor was a police officer and where the defendant offered only his own sworn statement, trial judge's charge that

jury, in determining credit to be given to police officer's testimony, may consider "the position he occupies" was reversible error. Faust v. State, Ballew v. State, 148 S.E.2d 430, 2 CLB No. 7, p. 48.

Iowa Instruction that jury is to pay particular attention to defendant's interest in outcome of trial in weighing his testimony neither deprives defendant of fair trial nor violates rule of *Griffin* v. *California*. State v. Ford, 145 N.W.2d 638, 3 CLB 58.

§57.45. Defendant's failure to testify

Court of Appeals, 2nd Cir. Although it is the "better practice" not to charge the jury concerning the defendant's failure to testify, the charge must be given if requested by a non-testifying defendant. Although not prejudicial, trial judge's statement prior to instructing jury on this point that "I normally do not include this in the charge. I do so only because I have been requested to do so" was improper and "would have been better left unsaid." United States v. Schabert, 362 F.2d 369, 2 CLB No. 6, p. 38.

Court of Appeals, 2nd Cir. Trial Judge's volunteering correct jury instruction on defendant's failure to take the stand is not reversible error although it is better practice not to give it unless requested by defendant. United States v. Woodmansee, 354 F.2d 235, 2 CLB No. 1, p. 39.

Arizona It is reversible error to instruct on the defendant's right not to testify in the absence of a request therefor. State v. Cousins, 420 P.2d 185, 3 CLB No. 1, p. 58.

Arizona If defendant does not request it, it is reversible error to instruct a jury that no inferences may be drawn from his failure to testify. State v. Zaragosa, 430 P.2d 426, 3 CLB 581.

Illinois Trial court's refusal to charge, as requested by defendant that his failure to testify did not create inference of guilt is reversible error. People v. Goins, 213 N.E.2d 52, 2 CLB No. 2, p. 53.

Iowa A defendant, if he requests, is entitled to an instruction that his failure to testify creates no inference or presumption against him. State v. Osborne, 139 N.W.2d 177, 2 CLB No. 2, p. 53.

New Mexico An instruction to the jury forbidding the raising of any presumption against the defendant by reason of his failure to testify and concluding, "but such fact can be the subject of reasonable comment or argument," is permissible under *Griffin* v. *California*, 380 U.S. 609 (1966), so long as no such comment or argument is actually made by the judge or prosecutor. State v. Gonzalez, 430 P.2d 376, 3 CLB 507.

§57.50. Duty to charge on defendant's theory of defense

Court of Appeals, 2nd Cir. Although inducement has been shown, trial judge need not charge jury on defense of entrapment if uncontradicted proof has established that the accused was "ready and willing without persuasion" and was "awaiting any propitious opportunity to commit the offense." However, the production of *any evidence* negating propensity whether in cross-examination or otherwise requires submission of the defense to the jury. Conviction reversed. U. S. v. Riley, 363 F.2d 955, 2 CLB No. 7, p. 34.

Georgia Where defense of alibi is supported both by defendant's unsworn statement and other witnesses for the defense, trial judge committed reversible error in failing to charge the jury on the law of alibi, even though no request had been made. Coppage v. State, 148 S.E.2d 484, 2 CLB No. 7, p. 48.

Missouri Court's failure to charge jury upon the defendant's theory of the case in prosecution for using an automobile without the owner's permission was reversible error. (Defendant's theory was that he had innocently purchased an automobile in good faith from a "salesman" believed to be employed by a reputable used car dealer.) State v. Drane, 416 S.W. 2d 105, 3 CLB 581.

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reversed where trial judge refused to instruct jury that if it found that defendant (who had made financial gains out of the transaction) had acted solely as the agent of the buyer in narcotics sale prosecution, he could not be convicted of the crime. People v. Miller, 24 A.D.2d 1023, 2 CLB No. 3, p. 60.

§57.60. Duty to charge on essential elements of crime

Court of Appeals, 5th Cir. Where the defendant is charged with aiding and abetting a theft of a package from the mail, and where the sole evidence as to his participation in the theft was in lending his knife to the principal, the trial court erred in refusing, upon request of defense counsel, to explain aiding and abetting to jury. Moore v. United States, 356 F.2d 39, 2 CLB No. 2, p. 39.

Court of Appeals, 10th Cir. In prosecution for conspiracy to receive, conceal, sell, etc., illegally imported heroin, it was plain error for trial court to fail specifically to instruct jury that evidence must show that each defendant had knowledge of illegal importation and that one defendant's knowledge of illegal importation could not be imputed to other defendants. Mason v. United States, 383 F.2d 107, 3 CLB 637.

Arizona Where the defendant was charged with murdering victim by having tortured her to death, it was reversible error for trial judge to have failed to instruct jury as to essential elements of murder by torture. State v. Brock, 416 P.2d 601, 2 CLB No. 9, p. 23.

Illinois Failure of trial court to instruct jury on fundamental element of crime requires reversal of conviction even where no instruction was requested by defense counsel, no objection was made to the charge, and point was not raised on appeal. People v. Davis, 221 N.E.2d 63, 3 CLB No. 1, p. 59.

Missouri Instruction to jury did not have to contain element of guilty knowledge where it was not interposed as a defense. State v. Page, 395 S.W.2d 146, 2 CLB No. 1, p. 56.

Oklahoma Failure of trial court in self defense case to define the term "aggressor" was error where circumstances may have caused jury to believe trial court considered the defendant to be the aggressor. Scaggs v. State, 417 P.2d 331, 2 CLB No. 9, p. 60.

§57.65. Duty to charge on prosecution's theory of case

Court of Appeals, 7th Cir. In an income tax evasion prosecution based upon the "net worth" method of proof, the trial court's failure to instruct the jury on the definition of that test, the assumptions on which it rests, and the inferences available both for and against the accused constitutes "plain error" requiring reversal of the conviction even in the absence of any objection by the defendant. United States v. Tolbert, 367 F.2d 778, 2 CLB No. 9, p. 31.

§57.68. Duty to charge on voluntariness

Court of Appeals, 9th Cir. It is error, under *Delli Paoli* v. *United States,* 352 U.S. 232 for trial judge, even though no objection or request is made, to fail to give jury immediate limiting instruction where one defendant's statements implicating his co-defendants are received in evidence at their joint trial. Ninth Circuit, nevertheless, affirms the conviction because the record, as a whole, "fairly shrieks the guilt of the parties" *(Lutwak* v. *United States,* 344 U.S. 604). Calhoun and Haas v. United States, 368 F.2d 59, 2 CLB No. 10, p. 40.

§57.70. Lesser included offenses

Court of Appeals, District of Columbia A defendant charged with facilitating the concealment or sale of narcotics in violation of 21 U.S.C. 174 is not entitled to a lesser included offense instruction under D. C. Code §33-402 (unlawful possession of narcotics) even though prosecutor established facilitation by showing possession (under the permissible inference of 21 U.S.C. 174). The defendant's right to a lesser included offense charge is controlled by the offense charged in the indictment and not the offense established

by the trial proof. Kelly v. United States, 370 F.2d 227, 2 CLB No. 10, p. 41.

Court of Appeals, 1st Cir. Where there is no factual dispute and where a finding of guilt of a lesser offense would be irrational, the court need not charge lesser included offense. Driscoll v. U. S., 356 F.2d 324, 2 CLB No. 2, p. 38.

Illinois Manslaughter conviction reversed and defendant discharged where the facts admitted of only two possibilities – *murder* or *not guilty*, and the trial court, over objection, submitted an instruction on voluntary manslaughter to the jury. Jury's failure to return a verdict on the murder counts resulted in an acquittal on those counts, as did the finding of guilty on the manslaughter charge. (See *People* v. *Hinkle*, 408 Ill. 533, 97 N.E.2d 837; *People* v. *Newman*, 360 Ill. 226, 195 N.E. 645.) People v. McMurray, 212 N.E.2d 7, 2 CLB No. 1, p. 57.

Illinois Aggravated battery (requiring knowledge and intent) is not a lesser included offense of involuntary manslaughter (requiring only the mental state of recklessness). For an offense to be a lesser offense, and be included within another offense which is greater, the greater offense must include every element of the lesser offense plus other elements. People v. Higgins, 229 N.E.2d 161, 3 CLB 657.

Pennsylvania Where there was no evidence of voluntary manslaughter, trial court was not required to submit issue to jury in first degree murder trial. Pavillard v. Commonwealth, 220 A.2d 807, 2 CLB No. 8, p. 50.

Wisconsin Where evidence sustained charge of lesser included offense but where defendant requested that only a first degree murder charge be submitted to the jury, the trial court's acquiescence in that request was not reversible error. Nuenfeldt v. State, 138 N.W.2d 252, 2 CLB No. 1, p. 57.

§57.75. Limiting and cautionary instructions

Court of Appeals, District of Columbia Where a witness is impeached by prior inconsistent statements, it is error, even in the absence of any request, for trial judge to fail to give limiting instructions. Jones v. United States, 385 F.2d 296, 3 CLB 558.

Pennsylvania Prosecutor's cross-examination of court's witness with regard to admissions made to her by the defendant constitutes reversible error where the court fails to explain to jury that the prior inconsistent statements may not be used as evidence of defendant's guilt but are admissible solely to impeach her credibility as a witness. Commonwealth v. Di Pasquale, 230 A.2d 449, 3 CLB 501-02.

§57.77. Motive

Iowa Trial court need not instruct jury that state's failure to establish motive for crime is a factor to be considered as indicating defendant's innocence. State v. Shipley, 146 N.W.2d 266, 3 CLB No. 1, p. 61.

§57.78. Offense not charged in indictment

Kansas Instruction which charged crime of illegal possession of pistol was error where murder indictment failed to include count for illegal possession. State v. Booker, 415 P.2d 411, 2 CLB No. 8, p. 50.

Tennessee It was not reversible error to give grand larceny instruction although the indictment did not charge grand larceny and the proof established only petit larceny. Conviction for petit larceny made it clear that jury was not confused by the charge. Graham v. Tennessee, 404 S.W.2d 475, 2 CLB No. 8, p. 49.

§57.80. Presumptions and inferences – in general
§57.90. Presumptions and inferences – Presumption of innocence

Mississippi The trial court committed reversible error in charging the jury as follows: "[Y]et the court now says to you that this presumption of innocence, which the law throws around the defendant as a shield and a safeguard, is not intended to shield from punishment anyone who is in fact guilty, but is simply a humane

provision of the law to guard against the conviction of an innocent man, and the court further says to you that if you believe from the evidence in this case beyond a reasonable doubt, that the defendant is guilty as charged, then in that event, it is your sworn duty to say guilty by your verdict regardless of the presumption of innocence and the further fact of the burden of proof being on the state." Keith v. State, 197 So.2d 480, 3 CLB 427.

Texas It is reversible error not to give a presumption of innocence charge when requested by defendant. Bennet v. State, 396 S.W.2d 875 (Court of Criminal Appeals of Texas); Brown v. State, 396 S.W. 2d 876, 2 CLB No. 2, p. 52.

§57.92. Presumptions and inferences — Presumption that witness speaks the truth

Court of Appeals, District of Columbia The D. C. Circuit, following the Third Circuit (*U. S. v. Meisch*, 370 F.2d 768, 773-774), suggests discontinuance of jury instruction that a "witness who takes the stand is presumed to speak the truth" on ground that it has a tendency to impinge on the presumption of innocence. "Lurking in such an instruction is the risk that the jury might conclude that they were required to accept the testimony of the prosecution's witnesses at face value, particularly when it is uncontradicted by other witnesses." Stone v. United States, 379 F.2d 146, 3 CLB 330.

Court of Appeals, 3rd Cir. Trial judge's charge that ". . . a witness is *presumed* to speak the truth but this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence . . ." held improper. It derogates from the jury's exclusive function to judge the credibility of witnesses, conflicts with the presumption of innocence (especially where the defendant puts on no defense), and clashes with the charge on the burden of proof. United States v. Meisch, 370 F.2d 678, 3 CLB 42.

Arkansas Prejudicial error for trial court to tell jury that "everybody is presumed to be telling the truth" immediately after defense counsel had posed the following question on cross-examination to the state's witness "You had that pretty well memorized, didn't you?"; the conviction for assault with intent to kill is reversed because the court's statement was an expression of his opinion as to the credibility of the witness. Dunfee v. State, 412 S.W. 2d 614, 3 CLB 342.

§57.94. Presumptions and inferences — Presumption that felon is less likely to tell truth

Oregon It was error for the trial court to charge that "[t]he law presumes that one who had been convicted previously of a crime is less likely to tell the truth than one who has not." However, the error was not of constitutional dimension and thus was insufficient to warrant post-conviction collateral relief. Otten v. Gladden, 417 P.2d 1017, 2 CLB No. 9, p. 51.

§58.00. Presumptions and inferences — Recent and exclusive possession

North Carolina A court's charge on the rule of "unexplained possession of fruits of a crime" was erroneous where it suggested that conviction was required in the absence of an explanation of recent possession. State v. Frazier, 150 S.E.2d 431, 3 CLB No. 1, p. 60.

§58.10. Prior convictions — effect

Illinois Absent some request, it was not error for the trial judge to fail to charge that a prior conviction of defendant brought out on cross-examination could be used for impeachment purposes only. People v. Durham, 212 N.E.2d 765, 2 CLB No. 2, p. 51.

§58.30. Removal of element of crime or proof from consideration by jury

Court of Appeals, 5th Cir. Whether weapon was of a particular class so as to require registration could not be taken from the jury. Trial court should not have instructed jury that it had found as a matter of law the firearm was subject to registration. Bryant v. U. S., 373 F.2d 403, 3 CLB 171.

Georgia Instruction to jury that if state proved material allegations of crime charged beyond a reasonable doubt defendant was guilty was reversible error because it restricted jury to a consideration of only the State's evidence. Salisbury v. State, 146 S.E.2d 776, 2 CLB No. 4, p. 54.

North Carolina Where, in a grand larceny prosecution, all the evidence is to the effect that the property in question has a value far in excess of the felony-misdemeanor dividing line, the trial judge need not require the jury to fix the value. State v. Brown, 147 S.E.2d 916, 2 CLB No. 6, p. 45.

§58.40. Judicial notice

Colorado Where information charged defendant with illegal possession of "a narcotic drug, namely marijuana, i.e. cannabis," the trial court did not err in charging the jury that marijuana and cannabis were synonymous terms despite absence of proof with respect to that issue: "... [W]e conclude as a matter of law that marijuana is identical with cannabis, as it is merely a geographically oriented name for cannabis." Martinez v. People, 417 P.2d 485, 2 CLB No. 9, p. 51.

§58.50. Prejudicial comments by trial judge during charge

Court of Appeals, District of Columbia Trial judge's charge that "where there is any doubt you must determine those questions in favor of the *criminal*" and that the jury may infer that the defendant took the property of complainant "... unless it is *very satisfactorily* explained to you by this defendant as to how the property was in his possession" criticized for use of word "criminal" and term "very satisfactorily." No objection was raised in the trial court, however, and conviction was affirmed. Robertson v. U. S., 364 F.2d 702, 2 CLB No. 7, p. 38.

Georgia Judge's charge that verdict (normally entered by jury on indictment) would have to be stated in open court "because there are certain entries which cannot be removed from the indictment, and I am of the opinion it would be improper and maybe reversible error by the Appellate Court if I allowed you to see the indictment with these several entries hereon." Faust v. State, Ballew v. State, 148 S.E.2d 430, 2 CLB No. 7, p. 48.

§58.60. Supplemental instructions — in general

Arkansas Conviction reversed where trial court gave instructions on lesser included offense after jury had deliberated for 28 hours and was deadlocked. Defendant who allegedly aided and abetted homicide may properly be tried and convicted for murder despite fact that actual killer has already been acquitted. Rush v. State, 395 S.W.2d 3, 2 CLB No. 1, p. 50.

Tennessee It was not error for trial judge to recall jury, after three hours of deliberation, for additional instruction that where defendant intends to shoot and kill one person but instead kills another it is not necessary that he have malice against deceased or intention to kill deceased. Instruction conformed with the evidence and the recall was proper. The trial judge should have admonished the jury to consider the additional instruction in conjunction with the entire charge but the failure to do so was not reversible error where the defense was insanity. Burton v. State, 394 S.W.2d 873, 2 CLB No. 1, p. 47.

§59.10. Exceptions to charge

Court of Appeals, 10th Cir. Requiring defense counsel to make his objections to the charge at a side bar conference with the jury in the box after he had requested that the objections be made "out of the presence of the jury" as provided by Rule 30, F.R.Cr.P. (as amended July 1, 1966) was reversible error. "The amendment to Rule 30 was intended to allow counsel full opportunity to argue and record objections to the court's instructions and, upon request, to do so outside the presence of the jury in order to avoid the psychological pressure of low-tone bench conferences leading to truncated presentations and understandings." Hall v. United States, 378 F.2d 349, 3 CLB 330.

§60.00. Requirement of an impartial jury — in general

Court of Appeals, 8th Cir. Where trial judge conducted his own "comprehensive" examination of the prospective jurors, it was not reversible error for him to refuse to ask (among other questions), whether the jurors believed the testimony of government witnesses was entitled to more weight. Ross v. United States, 374 F.2d 97, 3 CLB 244, 258.

§60.05. Requirement of an impartial jury — Selection of veniremen

Alaska The court rule, based upon considerations of expense, which limited the drawing of names for grand and petit jury service to those persons residing within a fifteen mile radius of the City of Anchorage did not deprive appellant of the equal protection of the laws. Crawford v. State, 408 P.2d 1002, 2 CLB No. 3, p. 53.

§60.06. Requirement of an impartial jury — Qualifications

Colorado A prospective juror who is conscientiously opposed to the imposition of the death sentence in any and every case is subject to challenge for cause as one who announces in advance that he will not follow the instructions of the court. Bell v. People, 431 P.2d 30, 3 CLB 656.

§60.08. Requirement of an impartial jury — Systematic exclusion of Negroes etc.

Georgia Supreme Court of Georgia holds that the fact that a statute provides for the separate listing of Negro and white taxpayers (from which prospective jurors are chosen) does not entitle a defendant to quash the indictment upon constitutional grounds where the evidence adduced at a hearing indicates that the jury commissioners had not discriminated in fact. O'Bryant v. State, 149 S.E.2d 654, 2 CLB No. 9, p. 51.

Indiana It was improper for jury commissioners in compiling list of prospective jurors from tax rolls to select man's name and omit his wife's wherever married couples names appeared, but indictment would not be dismissed in absence of showing that jury commissioners arbitrarily or deliberately excluded women from jury list or that their action was probably harmful to defendant's substantive rights. Butler v. State, 229 N.E.2d 47, 3 CLB 655.

Mississippi Grand larceny conviction reversed and remanded where no Negroes served on the grand or petit jury and where evidence further revealed that Negroes had not been selected for jury service for sixteen years in Circuit Court of Montgomery County. Evidence that the clerk did not know the names of all jurors did not defeat *prima facie* case of systematic exclusion. Hopkins v. State, 182 So.2d 236, 2 CLB No. 3, p. 59.

§60.10. Conduct of voir dire — in general

Court of Appeals, District of Columbia Trial judge's refusal to conduct voir dire interrogation of prospective jurors with regard to racial prejudice as requested by defense counsel held plain error. King v. United States, 362 F.2d 968, 2 CLB No. 6, p. 42.

Illinois Where prior to completion of the selection of the jury, one of the jurors already selected became nervous and began to cry in the jury room because of a fear of confinement, trial judge's refusal to either excuse juror or permit defense counsel to question her was prejudicial error. People v. Kurth, 216 N.E.2d 154, 2 CLB No. 6, p. 48.

Texas Trial court's imposition of half hour time limit on both prosecution and defense counsel in examining prospective jurors was reversible error. De Le Rosa v. State, 414 S.W.2d 668, 3 CLB 428.

§60.60. Conduct of voir dire — Prejudice on part of individual jurors

Maryland Post conviction claim of prejudice arising from presence on jury of father of one of state's witnesses held waived by failure to make timely objection upon learning of ground for disqualification at trial. Bristow v. State, 219 A.2d 33, 2 CLB No. 6, p. 50.

Washington A juror's expressed resentment that a Negro defendant in a murder trial is permitted to be free on bond and to use the same restroom as the jurors, and that the courtroom is half full of Negroes, does not as a matter of law deprive such defendant of a fair trial. State v. Wilson, 431 P.2d 221, 3 CLB 656.

§60.70. Exposure of jurors to prejudicial publicity

United States Supreme Court Supreme Court reverses Sheppard murder conviction due to trial judge's failure to limit effect of publicity before and during trial. Sheppard v. Maxwell, 384 U.S. 333, 2 CLB No. 6, p. 27.

Georgia Defendant is not prejudiced by the fact that jurors learn of his prior criminal record from newspaper reports where the jurors state that they can still render an impartial verdict. Williams v. State, 149 S.E.2d 449, 2 CLB No. 9, p. 54.

§60.75. Experience in other criminal cases as affecting jurors' impartiality

Michigan Defendant was denied trial by an impartial jury where six members of jury had, the previous day, sat on a jury which tried and convicted his partner in crime and heard evidence implicating him. People v. Kamischke, 142 N.W.2d 21, 2 CLB No. 6, pp. 14, 22.

§60.78. Service on grand jury as affecting impartiality

Alabama Defendant entitled to new trial where petit juror had served on the grand jury which returned the indictment and had withheld that fact from trial judge on the voir dire. McHenry v. State, 181 So.2d 98, 2 CLB No. 2, p. 53.

§61.10. Deliberation – Failure to keep jury sequestered

Court of Appeals, 7th Cir. It is reversible error for federal trial judge in Seventh Circuit to permit criminal jury, over defendant's objections, to separate during its deliberations. United States v. Panczko, 353 F.2d 676, affirming *United States* v. *D'Antonio*, 342 F.2d 667, 2 CLB No. 1, p. 37.

Colorado ". . . where defense counsel expressly agrees to separation of the jury in a capital case, error cannot be predicated on that procedure in the absence of a showing of prejudice to the defendant." Segura v. People, 412 P.2d 27, 2 CLB No. 5, p. 45.

§61.15. Deliberation – Witness for prosecution serving as bailiff

Court of Appeals, 5th Cir. Where the trial testimony of the sheriff is not vital to the state's case, his intimate and continuous contact with the jury in his capacity as bailiff (without any discussion as to the case) does not deprive the defendant of his right to a fair and impartial jury. Bowles, Jr. v. United States, 366 F.2d 734, 2 CLB No. 9, p. 27.

§61.20. Deliberation – Extra-judicial communications

United States Supreme Court Jury bailiff's statements to one juror of "Oh that wicked fellow, he is guilty" and to another juror that "if there is anything wrong, the Supreme Court will correct it," made while watching over jury during 8 day murder trial, deprived defendant of his Sixth Amendment right of confrontation. Parker v. Gladden, 385 U.S. 363, 3 CLB 29.

§62.00. Verdict – General verdicts

Texas Murder conviction on general verdict of guilty upheld where counts of murder by strangulation and murder by assault with water bottle or other instrument were submitted to the jury, and there was evidence to support guilt under either count. Hintz v. State, 396 S.W.2d 411, 2 CLB No. 2, p. 51.

§62.04. Verdict – Inconsistent verdicts

Court of Appeals, 2nd Cir. Second Circuit reaffirms rule allowing inconsistent jury verdicts. See *Dunn* v. *United States*, 284 U.S. 390 (1932). "It is true as both Judge Hand and Mr. Justice Holmes rec-

ognized (citations omitted) that allowing inconsistent verdicts in criminal trials runs the risk that an occasional conviction may have been the result of compromise. But the advantage of leaving the jury free to exercise its historic power of lenity has been correctly thought to outweigh that danger. United States v. Carbone, 378 F.2d 420, 3 CLB 329-30.

Court of Appeals, 3rd Cir. Consistency in jury verdicts on separate counts of a single indictment not required. United States v. Vantine, 363 F.2d 853, 2 CLB No. 6, p. 39.

New York Appellate Division Jury verdict for defendant on cause of action for false arrest inconsistent with plaintiff's verdict on cause of action for malicious prosecution. Adams v. New York City Housing Authority, 265 N.Y.S.2d 220, 2 CLB No. 2, p. 50.

North Carolina Jury verdict finding defendant not guilty of entering but guilty of aiding and abetting was a not guilty verdict with respect to breaking and entering count of indictment. State v. Rhinehart, 148 S.E.2d 651, 2 CLB No. 7, p. 41.

§62.06. Verdict – Compromise verdicts

Kentucky Statement of two jurors, upon being polled following a verdict of guilty, that "we agree to the verdict but it is against our better judgment" was insufficient to upset verdict absent some indication that they were forced to vote guilty. Hall v. Commonwealth, 402 S.W.2d 701, 2 CLB No. 6, pp. 12, 21.

§62.30. Verdict – Unauthorized views

Oklahoma Evidence against defendant was so overwhelming that he could not have been prejudiced when ten of the twelve jurors were taken on a tour of the county jail during a recess and saw him behind bars with other prisoners. As a general matter, public tours of jail facilities should be encouraged. The incident, however, may have contributed to the severity of the sentence fixed by the jury, and sentence is therefore reduced. Moore v. State, 430 P.2d 340, 3 CLB 581.

§63.10. Procedure where misconduct is brought to light – Duty of trial judge to poll jury or conduct inquiry

Court of Appeals, 5th Cir. Where defendant alleges improper conversation between prosecution witness and juror, trial court's failure to conduct inquiry is abuse of discretion. Richardson v. United States, 360 F.2d 366, 2 CLB No. 5, p. 32.

Court of Appeals, 9th Cir. Where trial court had admonished jurors on two occasions to avoid all out of court communications relating to case, it was not a violation of due process for it to refuse to poll jury to determine whether any of the jurors had read prejudicial article appearing in local newspaper. Hilliard v. Arizona, 362 F.2d 908, 2 CLB No. 7, pp. 10, 29.

Court of Appeals, 10th Cir. Trial judge is under independent duty to poll the jury on defense counsel's motion for a mistrial based upon newspaper article published during course of trial which mentions defendants' withdrawn guilty pleas and contains account of jury-excluded hearing at which defendants' incriminating statements were ruled inadmissible. Mares v. United States, 383 F.2d 805, 3 CLB 484-485.

§63.20. Procedure where misconduct is brought to light – Duty to grant mistrial

Michigan Where jurors, upon interrogation, denied any possible prejudice, brief conversation which they initiated with prosecutor prior to the commencement of deliberation and which did not deal with evidence in the case did not require the granting of a mistrial. People v. Schram, 142 N.W.2d 662, 2 CLB No. 7, pp. 7, 27.

§65.00. Right of defendant to be present

Arizona Defendant who wilfully or voluntarily absents himself from jurisdiction waives his right to be present at sentencing. Court may impose sentence in *absentia*. Johnson v. State, 420 P.2d 298, 3 CLB 69.

§65.20. Right of allocution

Court of Appeals, 9th Cir. Right of allocution attaches to initial imposition of sentence under 18 U.S.C. 4208(b) (under which maximum sentence is imposed and defendant is sent to a federal facility for a 90 day study, at the end of which period, he is returned for final sentencing). Sherman v. United States, 383 F.2d 837, 3 CLB 561.

Minnesota Trial judge's failure to afford convicted defendant an opportunity to speak in his own behalf at the time of sentence does not require that the sentence be vacated where there is adequate assurance (by virtue of a presentence investigation report) that the trial judge had before him the defendant's version of the events leading to his conviction and other background information normally considered in mitigation of penalty. State ex rel. Krahn v. Tahash, 144 N.W.2d 262, 2 CLB No. 8, p. 55.

New York Appellate Division Where, at the time of sentence, defendant was asked, pursuant to statute, whether he had any legal cause to show why judgment should not be pronounced against him, his attorney's statement, "You will have to answer no" was an improper restraint upon a free response to the allocution which should have been corrected by the trial court. Defendant ordered resentenced. People v. Mohney, 265 N.Y.S.2d 826, 2 CLB No. 2, p. 59.

§65.25. Pre-sentence report – contents

New York Appellate Division Psychiatric report required by statute before court may impose indeterminate one day to life sex offender sentence should discuss and analyze defendant's sexual problem and whether it is of a type which would yield to treatment. The report should also state the risk to society involved in the defendant's immediate release, with or without treatment, and defendant's potential for responding to treatment, presently or otherwise. The sentencing court should also be reasonably certain that appropriate treatment will be given defendant. People v. Kearse, 28 A.D.2d 910, 3 CLB 587.

§65.30. Pre-sentence report – right to examine pre-sentence report

Court of Appeals, 2nd Cir. The Second Circuit, in *dicta*, discusses the recently revised Rule 32(c), F.R.Crim.P. which authorizes the sentencing court to disclose, in its discretion, the contents of a pre-sentence investigation report. The court notes that this authority should not be exercised conservatively and, where the information is not confidential, there is little reason for not disclosing the contents. United States v. Fischer, 381 F.2d 509, 3 CLB 494.

§65.45. Pre-sentence report – trial court's reliance upon material not contained in pre-sentence report

New Jersey Defendant's sentence vacated where sentencing court stated that "it is well known . . . that anybody who wants to play the numbers game can go see the [defendant] and he will take the bet . . . people can't go writing book . . . from 1940 all the way until now and just flaunt the law. . . ." and there were no facts in his pre-sentence report to support such a statement. "[I]t was improper for [the sentencing judge] to rely upon any factual information of this nature not officially and reliably recorded in the pre-sentence report." State v. Gattling, 230 A.2d 157, 3 CLB 513.

§65.50. Right to separate trial where defendent is being sentenced under sex deviate statute, etc.

Court of Appeals, 3rd Cir. Where, under Pennsylvania statute, enhanced punishment results from trial court's factual determination that defendant, already found guilty of a sex crime, is a person who would, "if at large, constitute a threat of bodily harm to members of the public . . ." defendant has a right of confrontation and cross-examination in connection with that factual determination. U. S. ex rel. Gerchman v. Maroney, 355 F.2d 302, 2 CLB No. 1, p. 38.

Pennsylvania Pennsylvania's Barr-Walker Act, authorizing an indefinite sentence of from one day to life for certain sex offen-

ders, is held to be unconstitutional upon the authority of the recent United States Supreme Court decision in *Specht* v. *Patterson*, as failing to give a defendant reasonable notice and opportunity to be heard upon the issue of whether he is a danger to the public. Commonwealth v. Dooley, 232 A.2d 45, 3 CLB 661.

§65.55. Right to separate sentence hearing where jury fixes punishment (bifurcated trial)

Court of Appeals, 2nd Cir. Where jury can impose death sentence under federal prosecution for homicide committed during the course of a bank robbery, two stage trial on guilt and punishment is not mandatory but should normally be granted where requested by defendant. United States v. Curry, 358 F.2d 904, 2 CLB No. 5, p. 35.

Colorado "Single verdict" procedure by which a jury in a murder trial finds the defendant guilty and simultaneously sentences him to die does not violate due process of law. Segura v. State, 431 P.2d 768, 3 CLB 659.

§65.60. Delay in sentencing

Court of Appeals, 4th Cir. Although principal's conviction is reversed for new trial on the basis of a possible technical defense, aider and abettor whose guilt was clear and whose conviction was affirmed on appeal is not entitled to a reduction or postponement of his sentence on the theory that principal may not be retried or if retried be acquitted. United States v. Edlin, 370 F.2d 566, 3 CLB 45.

Illinois Two year delay between plea of guilty and sentencing does not deprive court of jurisdiction where defendant did not specifically object to the postponement of sentence. People ex rel. Houston v. Frye, 221 N.E.2d 287, 3 CLB 70.

§65.65. Standards for imposing sentence

Court of Appeals, 5th Cir. Sentence permitted by statute held invalid in collateral attack under 28 U.S.C. 2255 where, prior to imposing sentence, trial judge advises defendant that he "has been proven guilty beyond a reasonable doubt by overwhelming evidence" and that "if [he] will come clean and make a clean breast of this thing for once and for all, the court will take that into account in the length of sentence to be imposed . . ." but that ". . . if [he] persist[s] . . . in [his] denial . . . that [he] participated in this robbery, the court also must take that into account." Sentencing court employed improper standard in imposing sentence. Thomas v. United States, 368 F.2d 941, 2 CLB No. 10, p. 43.

§65.68. Invalid conditions

North Carolina Suspended sentence may not be imposed on condition that defendant refrain from appealing judgment of conviction. State v. Rhinehart, 148 S.E.2d 651, 2 CLB No. 7, p. 41.

§65.70. Duty to advise defendant of his right to appeal

Court of Appeals, 5th Cir. Rule 37(a)(2) of the Federal Rules of Criminal Procedure which requires court, *after trial*, to advise defendant who appears at sentence without a lawyer of his right to appeal, held not applicable to defendant who has pleaded guilty. Boyes v. United States, 354 F.2d 31, 2 CLB No. 1, p. 37.

Kansas The petitioner's claim that neither his retained counsel nor the court advised him of his right to appeal does not present a "justiciable question requiring . . . an evidentiary hearing. The court is not obliged to inform a convicted defendant of the right to appeal. Moreover, "it must be assumed counsel fully advised him of his rights, including the right to appeal. The record indicates that counsel ably represented the petitioner . . ." Ware v. State, 426 P.2d 78, 3 CLB 342.

§65.80. Resentencing

Court of Appeals, 2nd Cir. Where defendant was given concurrent sentences of five years for a substantive violation (on which the maximum was ten) and seven years for a conspiracy violation (on which the maximum was only five years), sentencing judge could not transpose sentences once defendant started serving

them even though it was for avowed purpose of conforming them to his original intention. Sentence on conspiracy count reduced to five years. United States v. Sacco, 367 F.2d 368, 2 CLB No. 9, pp. 11, 40.

§66.00. Credit for time spent in custody prior to sentencing

Court of Appeals, District of Columbia Failure of trial court to give defendant, sentenced under a statute which did not carry a minimum mandatory sentence to maximum term, credit for jail time spent for lack of bail constitutes an unconstitutional, arbitrary classification. There was no rational basis for denying him credit when Congress, in earlier legislation, had provided automatic jail credit to the defendant sentenced under a minimum mandatory statute, thus providing him with what it assumed other defendants were getting in the absence of legislative action. Stapf v. United States, 367 F.2d 326, 2 CLB No. 7, p. 41.

Court of Appeals, 10th Cir. Equal protection clause does not require state to give defendant (who was convicted on a retrial after his first conviction was reversed on appeal) credit for the time served under the void conviction. Newman v. Rodriguez, 375 F.2d 712, 3 CLB 332.

Oklahoma In view of statute allowing credit for jail time before delivery to state prison only for first offenders, trial court lacks power to grant such credit to a second offender, regardless of the length or cause of pre-sentence detention. Williams v. Page, 430 P.2d 345; see also Perry v. State, 430 P.2d 344, 3 CLB 587.

§66.15. Cruel and unusual punishment — Particular penalties as constituting cruel and unusual punishment

Court of Appeals, 4th Cir. Fourth Circuit denies claim of state prisoner, sentenced to death for the aggravated rape of an eleven year old girl, that the death sentence constituted "cruel and unusual punishment" (cf. *Snyder* v. *Cunningham, Rudolph* v. *Alabama*, 375 U.S. 889). Court however indicates that "there is extreme variation in the degree of culpability of rapists" and with a less aggravated situation, a different result might obtain. Snider v. Peyton, 356 F.2d 626, 2 CLB No. 3, p. 52.

Court of Appeals, 4th Cir. Chronic alcoholic's conviction for public intoxication held "cruel and unusual punishment." Driver v. Hinnant, 356 F.2d 761, 2 CLB No. 2, p. 40.

California Public Utilities Commissions directive requiring telephone company to discontinue service to subscriber who the police claim is using the telephone service in connection with unlawful activity held unconstitutional. Sokol v. Public Utilities Commission, 418 P.2d 265, 2 CLB No. 10, p. 51.

§66.30. Excessive sentences

Maryland Where there is no statutory limitation on the sentence for simple assault, a statutory maximum of 15 years for assault with intent to murder does not prevent court from imposing 20 years sentence for simple assault. Roberts v. Warden, 219 A.2d 254, 2 CLB No. 6, p. 51.

§66.35. Imposition of fines upon indigent defendants

New York ". . . [W]hen payment of a fine is impossible and known by the court to be impossible, imprisonment to work out the fine, if it results in a total imprisonment of more than a year for a misdemeanor, is unauthorized by the Code of Criminal Procedure and violates the defendant's right to equal protection of the law, and the constitutional bar against excessive fines." People v. Saffore, 18 N.Y.2d 101, 2 CLB No. 7, p. 50.

§66.40. Favorable sentencing treatment for co-defendant

Wisconsin Fact that defendant received a much more severe sentence than co-defendants who pleaded guilty does not *per se* violate equal protection or due process. Jung v. State, 145 N.W.2d 684, 3 CLB 54.

§66.50. Increasing sentence upon retrial

Court of Appeals, 3rd Cir. Where a state defendant originally convicted and sentenced on a plea of guilty succeeds in setting aside the conviction because he was unrepresented by counsel, the imposition of a greater sentence when he is thereafter tried on the charges and found guilty does not violate due process. United States ex rel. Starner v. Russell, 378 F.2d 808, 3 CLB 333.

Court of Appeals, 4th Cir. Fourth Circuit rules that a defendant who obtains a reversal of his conviction on constitutional grounds may not be sentenced on the retrial to a greater term than was imposed following the first trial. Patton v. North Carolina, 381 F.2d 636, 3 CLB 493.

§66.60. Multiple punishment – in general

Court of Appeals, 4th Cir. Where crime of which defendant was convicted provided for punishment by "fine or imprisonment," court could not, under 18 U.S.C. 3651, impose a fine *and* at the same time place the defendant on probation. United States v. Temple, 372 F.2d 795, 3 CLB 38.

Court of Appeals, 6th Cir. Multiple sentences for (1) interstate transportation and (2) concealment of stolen automobile upheld. United States v. Linkenauger, 357 F.2d 925, 2 CLB No. 4, p. 38.

Court of Appeals, 8th Cir. Resentence of defendant after he successfully vacates prior fully served sentence constitutes double punishment for single offense. Oksanen v. U. S., 362 F.2d 74, 2 CLB No. 6, p. 31.

Arizona Defendant, convicted of three separate counts of manslaughter as a result of the death of three passengers in the crash of the car he was driving while under the influence of alcohol, may properly be given consecutive sentences on each of the three counts. State v. Miranda, 416 P.2d 444, 2 CLB No. 8, p. 55.

California Trial court erred in imposing separate punishments for first degree robbery and assault with deadly weapon where both crimes were committed as a result of an indivisible transaction having a single purpose – (the robbery). People v. Ridley, 408 P.2d 124, 2 CLB No. 1, p. 62.

California Where single sale of heroin to undercover agent was contemplated by both parties but agent insisted on testing a portion of the heroin before purchasing the remainder, the delivery of the heroin at two separate intervals constituted only one crime and defendant could not be subjected to multiple punishment. In re Johnson, 420 P.2d 393, 3 CLB 63.

New York Imposition of consecutive sentences for robbery and conspiracy to commit robbery was error (Section 1938, N.Y. Penal Law). People v. Birmingham, 16 N.Y.2d 984, 2 CLB No. 1, p. 63.

§66.80. Multiple punishment – Sentencing under general verdict

Court of Appeals, 4th Cir. A sentence imposed on a general verdict of guilty covering a multi-count indictment may not exceed the maximum on the lowest count where the jury could conceivably have found defendant guilty of that lowest count. A sentence in excess of that maximum requires granting of new trial. United States v. Schmidt, 376 F.2d 751, 3 CLB 334.

Illinois Fundamental fairness requires all offenses arising out of same conduct to be tried jointly. Sentence allowed only for gravest offense. People v. Ritchie, 213 N.E.2d 651, 2 CLB No. 3, p. 57.

§66.90. Multiple punishment – Merger doctrine

Court of Appeals, 5th Cir. The imposition of consecutive sentences for robbery [18 U.S.C. 2113(a)] and the use of a dangerous weapon during the course of a robbery [18 U.S.C. 2113(d)] is invalid as punishing the defendant twice for only one offense. Whalen v. United States, 367 F.2d 468, 2 CLB No. 10, p. 43.

Court of Appeals, 5th Cir. Test for separate offenses is whether each requires

proof of an additional fact that the other does not. Llerandi v. United States, 358 F.2d 676, 2 CLB No. 4, p. 38.

Court of Appeals, 5th Cir. Defendant's conviction for both aiding and abetting a robbery and receiving the proceeds thereof held invalid under *Milanovich* v. *United States*, 358 U.S. 415. Baker v. United States, 357 F.2d 11, 2 CLB No. 3, p. 47.

§70.15. Multiple offender sentences — Right to attack prior conviction

Arizona Court holds that violation of right to counsel is not subject to collateral attack in multiple offender proceedings. State v. Salazar, 412 P.2d 289, 2 CLB No. 5, p. 50.

California Supreme Court of California rules that a foreign conviction which is made the basis for multiple offender punishment is subject to constitutional attack in the California courts. In re Woods, 409 P.2d 913, 2 CLB No. 3, p. 61.

New Mexico Trial court erred in refusing to permit constitutional (absence of counsel) attack on out-of-state conviction which was used as a basis for habitual offender judgment. State v. Dalrymple, 407 P.2d 356, 2 CLB No. 1, p. 57.

New York Defendant may attack constitutionality of prior New York felony conviction under multiple offender statute (Penal Law Sec. 1943). Statute has retrospective effect and in absence of waiver may be employed whenever prior New York felony conviction is sought to be used as a predicate for multiple offender punishment. People v. Jones, 17 N.Y.2d 404, 2 CLB No. 6, p. 50.

§70.20. Multiple offender sentences — Validity of prior conviction

Arizona Fact that sentence or execution thereof has been suspended and defendant placed on probation does not remove conviction from Arizona multiple offender statute. State v. Robinson, 408 P.2d 29, 2 CLB No. 1, p. 54.

Delaware Prior conviction under repealed Delaware statute making it a crime to operate a motor vehicle while under the influence of intoxicating liquor cannot be used as prior conviction to convict a defendant as a second offender under Delaware statute prohibiting "driving" while under the influence of intoxicating liquor. Court stresses that operating a motor vehicle does not necessarily include the concept of driving. McDuell v. State, 231 A.2d 265, 3 CLB 582-83.

Kansas Adjudication under Federal Juvenile Delinquency Act does not constitute a prior conviction for purposes of Kansas Habitual Criminal Act. State v. Fountaine, 414 P.2d 75, 2 CLB No. 6, p. 50.

Michigan Conviction of 13 year old in Mississippi for crime of rape cannot be basis for multiple offender conviction in Michigan because crime must be one which if committed in Michigan would be a felony. Thirteen year old defendant would have been treated as a juvenile and could not have been bound over to district court. Therefore, under no circumstances could crime be a felony in Michigan. People v. McIntire, 151 N.W.2d 187, 3 CLB 507.

New Mexico Fact that defendant's felony conviction for passing fraudulent check would, under statutory amendment, now be a misdemeanor does not preclude state from utilizing conviction as predicate felony in habitual offender proceedings. State v. Darrah, 417 P.2d 805, 2 CLB No. 9, p. 51.

South Dakota Federal conviction for violation of Dyer Act (interstate transportation of stolen vehicle) not a predicate for multiple offender punishment under habitual criminal statute unless record of conviction shows whether defendant stole the vehicle and what the value of vehicle was. Application of Abelt, 145 N.W.2d 435, 2 CLB No. 10, p. 54.

§70.40. Multiple sentences — Terms to be served concurrently

Alabama Court's statement as part of the judgment of conviction that "said sentence [is] to begin this day" is sufficient evidence of the court's intention to impose

a concurrent sentence with one presently being served by the defendant under a statute providing that multiple sentences are to be served consecutively "unless it is specifically ordered in the judgment entry that such sentences shall be served concurrently." Glisson v. State, 200 So.2d 493, 3 CLB 587.

§70.55. Probation – Maximum term

Court of Appeals, 10th Cir. Five years is the maximum term for which a defendant convicted in the Federal courts may be placed on probation. The second of two consecutive five year terms of probation is void. Federal court which has revoked probation may not suspend imposition of sentence again. Fox v. United States, 354 F.2d 752, 2 CLB No. 2, p. 44.

§71.15. Indigent defendants – Pre-requisites for in forma pauperis relief

Oklahoma Where petitioner seeks to prosecute *forma pauperis* appeal he must be willing to testify to his lack of financial capability. Gresham v. Page, 411 P. 251, 2 CLB No. 4, p. 54.

§71.20. Indigent defendants – Frivolous appeals

United States Supreme Court Supreme Court finds California procedure with regard to frivolous appeals violates Sixth Amendment right to counsel. Court lays down new guide-lines to be followed by an assigned appellate counsel who, after a conscientious examination of the record finds the case to be "wholly frivolous." Anders v. California, 386 U.S. 738, 3 CLB 313.

Court of Appeals, 8th Cir. Eighth Circuit refuses to allow assigned counsel to withdraw where he has filed only a short statement of facts and a list of certain cases which he argues conclusively show that there is no arguable issue or legal point to support the appeal. Citing *Anders* v. *California,* 386 U.S. 738 (1967), court holds that permission to withdraw from direct appeal must be accompanied by a brief referring to anything in record that might be argued on appeal as well as statement from counsel or the appellant as to the points which the latter chooses to raise on appeal. Smith v. United States, 384 F.2d 649, 3 CLB 636.

Florida Motion by assigned counsel to withdraw from representing defendant on first direct appeal because in his opinion the appeal was frivolous and its prosecution would constitute trifling with the court and a breach of professional ethics, is denied for counsel's failure to follow the procedure in *Anders* v. *California,* 386 U.S. 738. More specifically, any such motion must be "accompanied by a brief referring to anything in the record that might arguably support the appeal" so that the court would be able to study the record more easily to determine whether the appeal is frivolous. Herzig v. State, 200 So.2d 632, 3 CLB 569.

§71.30. Indigent defendants – Right to appeal

Kansas Supreme Court of Kansas overrules prior cases holding that convicted defendant who applies for parole acquiesces in the validity of the conviction and waives right to appeal. State v. McCarthes, 416 P.2d 290, 2 CLB No. 8, p. 52.

Virginia Where a court-appointed attorney advises the petitioner after sentence that he cannot appeal because he lacks the funds, this constitutes a deprivation of his right to appeal. Russell v. Peyton, 150 S.E.2d 530, 3 CLB No. 1, p. 48.

Virginia A defendant's right to appeal is absolute and cannot be defeated by either the opinion of the trial judge or court-appointed counsel that there are no grounds for review. Thacker v. Peyton, 146 S.E.2d 176, 2 CLB No. 3, p. 60.

§71.50. Indigent defendants – Right to transcribed minutes

California It is no denial of equal protection to require that an indigent defendant demonstrates the materiality of the summations of counsel before including transcripts of them in the record on appeal, so long as transcripts of evidentiary proceedings are provided. People v. Hill, 429 P.2d 586, 3 CLB 577.

Virginia The state need not purchase a stenographer's transcript in every case where a defendant cannot buy it. In such a case, or in the case where such transcript does not exist, "alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise." Thacker v. Peyton, 146 S.E. 2d 176, 2 CLB No. 3, p. 60.

§71.55. Indigent defendants – Right to appeal on full record

United States Supreme Court Indigent state appellant entitled to an appeal on the full record. Supreme Court reverses conviction where defendant requested and was granted permission to appeal on a "plenary record" but where his assigned counsel, apparently believing the appeal to be without merit, proceeded on an abbreviated "clerk's transcript" of the proceedings below. Entsminger v. Iowa, 386 U.S. 748, 3 CLB 314.

§71.70. Jurisdiction – in general

New York Neither the Court of Appeals nor the Appellate Division has jurisdiction to review an *ex parte* application for an eavesdropping order. Where defendant has been indicted his remedy is to move to suppress the evidence. Siegel v. People, 16 N.Y.2d 330, 2 CLB No. 1, p. 45.

§71.80. Jurisdiction – Appeal after guilty plea

California A defendant may appeal from a plea of guilty without obtaining a certificate of probable cause from the trial court when he is only attacking the post plea proceedings. People v. Ward, 426 P.2d 881, 3 CLB 428-29.

§71.90. Jurisdiction – Failure to file timely notice of appeal

United States Supreme Court Even though it is untimely, motion for a new trial which is brought within 10 days after conviction still extends the defendant's appeal period under Rule 37(a)(2) F.R. Cr.P. to 10 days after the denial of the motion. Supreme Court upholds as timely, notice of appeal filed 19 days after judgment but only 7 days after untimely denial of motion for new trial brought within original 10 day appeal period. Collier v. United States, 384 U.S. 59, 2 CLB No. 5, p. 30.

Court of Appeals, 4th Cir. Attorney's appeal held untimely where, although oral notice of appeal was given in court at the time of sentence, no written notice of appeal was filed with the Clerk within 10 days thereafter as required by Rule 37(a)(2), F.R.Cr.P. U. S. v. Temple, 372 F.2d 795, 2 CLB No. 1, p. 67.

Court of Appeals, 10th Cir. Fact that defense counsel did not receive notice of entry of order denying motion for new trial and that he was very busy in his practice did not constitute "excusable neglect" justifying a late filing of a notice of appeal under Rule 37(a)(2), F.R.Cr.P. Buckley v. United States, 382 F.2d 611, 3 CLB 554.

California Defendant's time to appeal will not be extended beyond statutory period even though he was ignorant of his rights and as a result failed to ask his trial counsel to file a notice of appeal. People v. Hatten, 411 P.2d 101, 2 CLB No. 4, p. 54.

Iowa Supreme Court of Iowa entertains untimely appeal where state's negligent failure to act caused delay. Ford v. State, 138 N.W.2d 116, 2 CLB No. 1, p. 45.

§72.00. Jurisdiction – Mootness

Georgia Where the appellant escaped from state prison prior to the argument of his appeal, the appeal was dismissed as moot. Gravitt v. State, 147 S.E.2d 447, 2 CLB No. 5, p. 43.

§72.10. Jurisdiction – Non-final orders

Court of Appeals, 4th Cir. Where no criminal proceeding is pending, district court's denial of taxpayer's motion (1) to suppress certain records taken from him by Internal Revenue Agents and (2) to enjoin the agents from using these records to support some forthcoming criminal prosecution held non-appealable. Parrish v. United States, 376 F.2d 601, 3 CLB 324.

§72.30. Appellate procedures – in general

§72.40. Appellate procedures – Contents of record

Court of Appeals, District of Columbia Due process does not require that a trial be stenographically recorded. Where initial appellate counsel stipulated to the accuracy of a statement of the proceedings and evidence, and where trial counsel neither requested that the trial be recorded nor requested a continuance to retain a private stenographer, the nonindigent appellants were not deprived of their due process rights on the appeal. Williamson v. United States, 224 A.2d 309, 3 CLB No. 1, p. 48.

Florida Impossibility of preparing accurate record on appeal due to the death of court stenographer prior to his transcribing notes requires a new trial where the normal use of a stipulated condensed narrative statement, as authorized under Florida Appellate Rule 6.7(f), would be of doubtful value for the reason that (1) two years had elapsed since the trial, (2) defense counsel had withdrawn after trial "under circumstances which would give little hope for effective cooperation from them in an endeavor to prepare a satisfactory stipulation of facts. . . ." and because (3) the defendant was raising many evidentiary questions and questions involving failure to charge the jury. Simmons v. State, 200 So.2d 619, 3 CLB 570.

§72.45. Appellate procedures – Procedures for correcting transcript

Pennsylvania Where the original typewritten record showed that the trial court directed the jury to render a verdict of guilty "if you do have such a reasonable doubt," and where the trial judge in his own handwriting inserted "not" after "do" to show the language actually used by him at trial, but failed to follow the statutory procedure for correcting transcripts, the conviction was reversed and a new trial granted. Commonwealth v. Kulik, 216 A.2d 73, 2 CLB No. 3, p. 68.

§72.50. Appellate procedures – Adequacy of briefs

New York Appellate Division "We find it necessary to observe that the brief of the appellant . . . is rampant with innuendos, suggestions, accusations and his attorney's interpretation of the evidence within and without the record, which procedure is not condoned by this court and is a matter of concern in the proper administration of justice." People v. Cuty and Rockefeller, 26 A.D.2d 596, 2 CLB No. 8, p. 40.

Illinois Appellate Court of Illinois, Second District announces that it will *pro forma* reverse all convictions in which the state fails to file an appellee's brief. People v. Spinelli, 227 N.E.2d 779, 3 CLB 569.

Ohio Supreme Court of Ohio dismisses appeal in criminal habeas corpus case *sua sponte* where brief prepared by appellant's retained counsel "utterly fails to comply with virtually every rule of this court." Drake v. Bucher, 213 N.E.2d 182, 2 CLB No. 2, p. 46.

§72.60. Appellate procedures – Confession of error

Michigan Where there is an evident insufficiency of proof at the close of the state's case, the prosecutor should either move to reopen his case to correct the deficiency or move to *nolle prosequi*. When he does not become aware of the insufficiency until after the trial has been completed and an appeal has been taken, he is under an obligation to confess error on the appeal. People v. Beaudoin, 151 N.W.2d 868, 3 CLB 569-70.

§72.90. Appellate review – Scope of appellate review

Court of Appeals, 5th Cir. Denial of motion for new trial based on newly discovered evidence may be raised (without separate notice of appeal) at time appeal from conviction is heard where motion also includes sufficiency of evidence grounds. Richardson v. United States, 360 F.2d 366, 2 CLB No. 5, p. 32.

Kansas "We hold the Supreme Court may on its own motion search the record and

take notice that a jurisdictional defect appears, disclosing that the trial court was without jurisdiction to enter a judgment of conviction for manslaughter in the first degree because the information did not charge such an offense; and where such defect appears this court has the duty to consider it. Accordingly, the instructions given by the trial court concerning manslaughter in the first degree were erroneous; the jury's finding . . . of manslaughter in the first degree must be set aside; and the judgment of conviction . . . must be set aside and vacated." State v. Minor, 416 P.2d 724, 2 CLB No. 9, p. 41.

§72.92. Appellate review – Review of factual determinations

New York Where (a) defendant in custody was questioned for 12 hours by relay team of detectives, (b) physician at jail testified to "injuries of recent origin" but stated that they could have been self-inflicted, (c) defendant, upon being examined by physician, claimed to have been beaten, the trial court's finding of voluntariness was affirmed. Appellate court holds that review of "fact" question presented is beyond its constitutional power. People v. Leonti, 18 N.Y.2d 384, 2 CLB No. 10, p. 49.

New York Where conflicting testimony on voluntariness of confession was resolved by a finding of voluntariness, the Court of Appeals could only review whether ". . . as a matter of law, the record does not support the holding that the confession was proven, beyond a reasonable doubt, to be voluntary." In view of Appellate Division affirmance, evidence is to be viewed in light most favorable to People. People v. Cerullo and Moccio, 18 N.Y.2d 839, 2 CLB No. 9, p. 45.

§73.00. Appellate review – Review of sentences

Ohio Intermediate Ohio appellate court erred in holding that trial court's sentence in intoxicated driving case was too severe where the sentence imposed was within the statutory limits and there was nothing in the record to indicate that the trial court did not consider prior record in imposing sentence. City of Toledo v. Reasonover, 213 N.E.2d 179, 2 CLB No. 2, p. 58.

§73.05. Appellate review – Power to modify judgment

New York Appellate Division Where reviewing court felt that evidence was insufficient to prove attempted grand larceny, second degree, but supported petit larceny conviction, the court reduced the conviction to petit larceny. People v. Brown, 264 N.Y.S.2d 604, 2 CLB No. 1, p. 46.

§73.10. Appellate review – Failure to object or file bill of exceptions as precluding appellate review

Court of Appeal, 5th Cir. Where defendant has failed to move at trial for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure, the appellate court need not consider the question of the sufficiency of the evidence but need only consider whether there was a "manifest miscarriage of justice" which would exist only if the record were "devoid of evidence pointing to guilt." Garrett et al. v. United States, 356 F.2d 951, 2 CLB No. 3, p. 44.

California Where the defense was alibi, defense counsel's admission in his summation that whoever entered the apartment committed the burglary is not to be deemed an implied waiver of a prejudicially erroneous instruction on the definition of burglary. People v. Failla, 414 P.2d 39, 2 CLB No. 6, p. 49.

Missouri Defense counsel's general objection to prosecutor's repeated comment that no evidence was offered by the defense to rebut the testimony of the complainant did not preserve the propriety of the prosecutor's statement for appellate review. Where defense counsel fails to specify the reason for his objection, the court will not review the merits of his contention that this was comment upon the defendant's failure to testify. Notwithstanding the court's recognition that "the trial judge may have correctly assumed

the reason the defendant's attorney had in his mind," it declines to "announce a rule of law approving general objections to statements" in argument on the theory that "the judge will aways understand the undisclosed reason the attorney may have in his mind." State v. Costello, 415 S.W.2d 816, 3 CLB 569.

North Carolina Where on his direct testimony the prosecution witness volunteered a prejudicial and partial unresponsive answer to a valid question a simple objection was insufficient. The objection was waived by counsel's failure to move (a) to strike the answer or (b) for an instruction to limit its effect to the defendant against whom the answer was proper. State v. Battle, 148 S.E.2d 599, 2 CLB No. 7, p. 44.

Texas Without a statement of facts, bills of exception to admission of evidence which did not show all the evidence on the question, could not be considered. *Jackson* v. *State*, 396 S.W.2d 896 (Court of Criminal Appeals of Texas). Where the statement of facts had been approved only by counsel for defendant, and not by counsel for the State or by the Court, it could not be considered on appeal. Kruger v. State, 396 S.W.2d 891, 2 CLB No. 2, p. 46.

§73.20. Appellate review – Serious error recognized in the absence of objection below

United States Supreme Court Where defendant was tried prior to *Griffin* v. *California*, 380 U.S. 609 (1965) but his conviction had not become final prior to that time, state court may not decline to reverse the conviction because of a lack of objection to what was concededly a constitutionally improper comment on the defendant's failure to testify. O'Connor v. Ohio, 385 U.S. 92, 8 CLB No. 10, p. 34.

Wisconsin Objection to receipt of confession or admissions of defendant not necessary to preserve issue for appellate review, where lack of objection is not a strategic move by counsel. Holloway v. State, 146 N.W.2d 441, 3 CLB No. 1, p. 65.

§73.30. Appellate review – Harmless error test

Court of Appeals, 9th Cir. Where defendant claims error in only two of six independent counts on which he has received concurrent sentences, government's motion to "affirm" conviction is granted on ground that errors, if any, were harmless. Page v. United States, 356 F.2d 337, 2 CLB No. 2, p. 34.

§73.40. Appellate review – Harmless error test for constitutional errors

California Supreme Court of California interprets the test for harmless constitutional error (*Chapman* v. *California*, 386 U.S. 18) as requiring no reasonable possibility that the verdict would have been different absent the error. People v. Ross, 429 P.2d 606, 3 CLB 580.

Connecticut Court notes that under *Chapman* v. *California*, 386 U.S. 24, which held that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was "harmless beyond a reasonable doubt," it was unable to state that the improper comment on defendant's failure to testify did not contribute to the defendant's conviction. State v. Chasse, 230 A.2d 51, 3 CLB 512.

§73.60. Bail pending appeal

Court of Appeals, 6th Cir. Where state is appealing Federal District Court order granting writ of habeas corpus, state prisoner is not entitled to bail pending appeal as a matter of right. Lewis v. Henderson, 350 F.2d 105, 2 CLB No. 2, p. 34.

Rhode Island A defendant convicted of a felony in a Rhode Island trial court has neither a statutory nor constitutional right to have bail set pending appeal. Quattrocchi v. Langlois, 219 A.2d 570, 2 CLB No. 7, p. 42.

§74.10. Motion for new trial – Newly discovered evidence

Court of Appeals, 6th Cir. Motion for a new trial on the ground of newly discovered evidence was properly denied without an evidentiary hearing, where alleged

jury misconduct had been raised in a prior similar motion and was therefore not "newly discovered." United States v. Hoffa, 382 F.2d 856, 3 CLB 558.

§74.40. Motion for new trial — Burden of proof

Missouri The defendant is entitled to a new trial where at a hearing in support of his motion for a new trial, he testifies that a sheriff entered the jury room several times during the jury's deliberation and closed the door after him; and that this had been done while the judge was absent from the courtroom. This established a *prima facie* violation of the applicable Missouri statutes protecting the jury deliberations. Since the state offered no evidence at the hearing, it had failed to sustain its burden of showing that the jurors had not been improperly influenced, thus requiring a reversal of the judgment of conviction. State v. Quinn, 405 S.W.2d 895, 2 CLB No. 10, p. 56.

§74.60. Motion to vacate conviction (state coram nobis, federal motions under 28 U.S.C. 2255, etc.) — in general

Minnesota Supreme Court of Minnesota establishes new standards for post-conviction evidentiary hearings. State ex rel. Roy v. Tahash, 152 N.W.2d 301, 3 CLB 657.

Court of Appeals, 10th Cir. Although defendant's 1931 federal conviction for interstate auto theft was clearly obtained in violation of his right to counsel, his petition for a federal writ of error coram nobis would be denied where he had been convicted of several other felonies; he was presently serving a life sentence for murder in state prison; and a state parole official testified (contrary to defendant's claim) that the conviction would have absolutely no bearing on his chances for parole. Although federal coram nobis is available even after the sentence has been fully served, the writ should be granted only where circumstances are present "compelling such action to achieve justice." *United States* v. *Morgan*, 346 U.S. 502. Ward v. United States, 381 F.2d 14, 3 CLB 484.

§74.65. Motion to vacate conviction — Prematurity

Nebraska Post conviction relief available to a defendant who has been convicted of a second crime and has been returned to prison as a parole violator, even though he has not begun to serve sentence for conviction which he is challenging. State v. Losiean, 144 N.W.2d 435, 2 CLB No. 9, p. 53.

§74.70. Motion to vacate conviction — Grounds

New York Appellate Division Defendant not entitled to a hearing on his post-conviction claim that pre-trial publicity was so inflammatory as to render a fair trial impossible and to leave him with no other alternative but to plead guilty where he first asserted claim nine years after conviction, his assertion is otherwise unsupported, and he never made a motion for a change of venue or a stay of proceedings. People v. Ryan, 28 A.D.2d 916, 3 CLB 580.

§74.80. Motion to vacate conviction — Right to an evidentiary hearing

Court of Appeals, 2nd Cir. Where the petitioner claimed that he had been induced and coerced into pleading guilty by a promise of a suspended sentence given to him by his lawyer and the Assistant U. S. Attorney, it was improper for the judge to deny the application for post-conviction relief under 28 U.S.C. 2255 wtihout a hearing, relying "conclusively" upon the pre-sentencing colloquoy between the sentencing judge and the defendant. Trotter v. U. S., 359 F.2d 419, 2 CLB No. 5, p. 37.

Court of Appeals, 5th Cir. When Texas statute provides for sanity hearing before jury for defendant under death sentence who is able to show reasonable doubt as to his sanity, refusal of state court to grant hearing to defendant in face of unrefuted affidavit of qualified psychiatrist that he is insane is a violation of due process. Welch v. Beto, 355 F.2d 1016, 2 CLB No. 2, p. 40.

Maine Petition for writ of error coram

nobis which alleged that petitioner was legally insane at time of trial and could not properly prepare and participate in his defense was not specific enough to warrant hearing. Petition must allege facts relied upon to support insanity conclusion.

State psychiatrist's unrebutted testimony at trial that petitioner was insane at time of homicide and also at time of trial referred to petitioner's inability to determine right from wrong and not to his competency to stand trial. As such, it was insufficient to require hearing. Thursby v. State, 223 A.2d 61, 2 CLB No. 10, p. 49.

New York Appellate Division Where defendant alleged in a coram nobis proceeding that he was induced to plead guilty by reason of an unfulfilled sentence promise, it was error to deny the application without a hearing. People v. Van Voorhees, 264 N.Y.S.2d 773, 2 CLB No. 1, p. 52.

New York Appellate Division "Defendant's bare allegation that his plea of guilty was induced by the promise of the District Attorney that he would be treated leniently, would be sentenced as a first offender, and would receive a maximum sentence of ten years is uncorroborated and is insufficient either to overcome the presumption of regularity attached to judicial proceedings or to warrant the granting of a hearing." People v. Weldon, 264 N.Y.S.2d 663, 2 CLB No. 1, p. 52.

Ohio On motion for post-conviction relief, trial judge may not rely on his recollection of what had occurred at original trial before him, but only on evidence presented at hearing. To hold otherwise would deprive defendant of rights of confrontation, cross-examination and impartial tribunal, State v. Maddox, 220 N.E.2d 708, 3 CLB No. 1, pp. 62-63.

§74.95. Motion to vacate conviction — Statute of limitations

New Mexico There is no time limit within which a motion pursuant to Rule 60(b)(4), Rules of Civil Procedure, Sec. 2-1-1 60(b), N.M.S.A. 1953 may be brought. The rule is a substitute for *coram nobis* and provides that:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void."

State v. Romero, 415 P.2d 837, 2 CLB No. 8, p. 52.

§75.00. Motion to vacate conviction — Successive petitions

Oregon Where statutory waiver of post-conviction grounds for relief follows an unjustified failure to raise all claims in first petition, the failure of petitioner's attorney to raise all of the issues which petitioner desired to raise did not limit the effect of the res judicata statute. Church v. Gladden, 417 P.2d 993, 2 CLB No. 9, p. 54.

§75.10. Motion to vacate conviction — Failure to raise claim at trial or on direct appeal as bar

New York Defense counsel's failure to object to, and affirmative use of, a statement taken after indictment bars appellate review. People v. DeRenzzio, 19 N.Y. 2d 45, 3 CLB 63.

New York Supreme Court Where colloquy between 16 year old defendant and trial court indicated that defendant might not have been fully aware of what he was doing when he entered guilty plea to second degree murder *coram nobis* application was granted, despite defendant's failure to appeal from judgment of conviction. People v. Steedly, 50 Misc.2d 921, 2 CLB No. 8, p. 44.

Pennsylvania A defendant who confesses to murder during a 51 day period in which he is without counsel cannot raise that issue in a collateral attack on the conviction where counsel did not object to the introduction of the confession at a hearing subsequent to the guilty plea. Commonwealth ex rel. Froeman v. Maroney, 218 A.2d 230, 2 CLB No. 5, p. 45.

§75.20. Motion to vacate conviction — Disqualification of trial judge to conduct evidentiary hearing

Court of Appeals, 1st Cir. First Circuit

rules that judge who accepts guilty plea without making inquiry as to voluntariness required by Rule 11, F.R.Cr.P. is disqualified from conducting evidentiary hearing on voluntariness which must be held when defendant subsequently moves under 28 U.S.C. 2255 to vacate the conviction because of the initial failure to comply with Rule 11. Halliday v. United States, 380 F.2d 270, 3 CLB 494.

New York Appellate Division Post conviction hearing on defendant's claim that he was incompetent at time of plea and sentence should be held before judge other than one who accepted plea and imposed sentence. People v. Hines, 28 A.D.2d 909, 3 CLB 583.

§75.35. Federal habeas corpus — Grounds

Court of Appeals, 4th Cir. Fourth Circuit characterizes state sentence as "shocking" and "convincing argument" for appellate review of sentences, but sustains conviction for want of federal constitutional violation. Stevens, Jr. v. Warden, 382 F.2d 429, 3 CLB 561.

Court of Appeals, 4th Cir. Federal habeas corpus lies to review arbitrary action of prison officials punishing prisoner's attempts to secure freedom of worship for himself and others similarly situated. Howard v. Smyth, 363 F.2d 143, 2 CLB No. 8, p. 34.

Court of Appeals, 5th Cir. Defendant's competency to stand trial can be raised in federal habeas corpus proceeding. Clark v. Beto, 359 F.2d 554, 2 CLB No. 4, p. 35.

Court of Appeals, 8th Cir. Habeas corpus improper remedy. Person being held as mentally incompetent to stand trial must apply for competency determination to court which committed him. Arco v. Ciccone, 359 F.2d 796, 2 CLB No. 6, p. 33.

§75.45. Federal habeas corpus — Exhaustion of state remedies

United States Supreme Court Having exhausted state remedies, prisoner was entitled to a federal determination of his claim on the merits. Roberts v. LaVallee, 389 U.S. 40, 36 LW 3171, 3 CLB 635.

Court of Appeals, 10th Cir. Where state courts have inordinately delayed the determination of state prisoner's post-conviction proceeding, the federal courts should not deny relief because of failure to exhaust state remedies. Smith v. Kansas, 356 F.2d 654, 2 CLB No. 3, p. 46.

§75.50. Federal habeas corpus — Burden of proof

Court of Appeals, 5th Cir. Where state prisoner testifies at his federal habeas corpus hearing that he (1) had been held incommunicado for four months following his arrest, (2) was tried, convicted of murder, and sentenced to life imprisonment three days after being assigned counsel, (3) had requested an appeal but none was ever filed; and where it further appears that no witnesses had been called in his behalf and a co-defendant's confession had been introduced into evidence at the trial, the burden of going forward is shifted to the state to introduce "countervailing evidence." Mosley v. Dutton, 367 F.2d 913, 2 CLB No. 9, p. 27.

§75.52. Federal habeas corpus — Procedure

Court of Appeals, 9th Cir. Although a federal habeas corpus proceeding brought by a state prisoner is civil in nature, he does not have the right either under Rule 33 of the Federal Rules of Civil Procedure or 28 U.S.C. 2246 to submit written interrogatories to the respondent warden as a means of pre-hearing discovery. Wilson v. Harris, 378 F.2d 141, 3 CLB 327.

§75.55. Federal habeas corpus — Mootness

Court of Appeals, 8th Cir. Absent a showing of purposeful evasion by the confining authorities, removal from the jurisdiction of the Court of Appeals renders appeal from a habeas corpus denial moot. Sharp v. Ciccone, 360 F.2d 605, 2 CLB No. 6, p. 34.

§75.65. State habeas corpus — Grounds

United States Supreme Court New York

law which grants jury review to all persons civilly committed as insane except those committed at the expiration of their prison term held a violation of equal protection. New York law which permits individual who has been civilly committed at the expiration of his prison term to be kept in a hospital for the criminally insane on the certification of the state department of mental hygiene, but which requires a judicial determination that the individual is dangerously mentally ill with regard to all other individuals civilly committed also held a violation of equal protection. Baxstrom v. Herold, 383 U.S. 107, 2 CLB No. 3, p. 43.

Illinois Relator, confined as incompetent to stand trial, entitled to jury trial upon the issue of restored competency. Issue raised by way of habeas corpus. People ex rel. Suddeth v. Rednour, 211 N.E.2d 281, 2 CLB No. 1, p. 56.

Nevada Habeas corpus extended to apply to case where petitioner plead guilty as a second felony offender and thereafter discovered that the prior conviction was in fact a misdemeanor. State ex rel. Osborn v. Fogliani, 417 P.2d 148, 2 CLB No. 9, p. 49.

New York New York Court of Appeals expands writ of habeas corpus to include claimed deprivation of fundamental constitutional or statutory rights. People ex rel. Keitt v. McMann, 18 N.Y.2d 257, 2 CLB No. 9, p. 49.

Pennsylvania Neither trial court's comment that acquittal would be miscarriage of justice, nor testimony that petitioner, while in custody, remained silent while incriminating statements were being made by co-defendant, was sufficient ground for habeas corpus relief. Commonwealth ex rel. Smith v. Rundle, 223 A.2d 88, 2 CLB No. 10, p. 54.

Utah Physical or mental disability rendering prisoner unable to engage in normal prison activities or in any recreational or rehabilitation programs does not entitle him to writ of habeas corpus. Bryant v. Turner, 431 P.2d 121, 3 CLB 659.

§75.70. State habeas corpus – Scope of relief

Iowa Successful habeas petitioner is not entitled to unconditional release where the petition is based upon ineffective assistance of counsel at the time of the guilty plea. Court retains jurisdiction to retry petitioner on original information. Birk v. Bennett, 141 N.W.2d 576, 2 CLB No. 5, p. 50.

§75.75. State habeas corpus – Venue

New York Inmate of state prison may bring habeas corpus only in county within which prison is situated. Matter of Hogan v. Culkin, 18 N.Y.2d 330, 2 CLB No. 9, p. 49.

§76.10. Revocation of probation – Grounds

Oregon Revoking a defendant's probation for drinking intoxicants in violation of the conditions of his probation is proper even though trial judge knew when he imposed probation that the defendant was an alcoholic. Sobota v. Williams, 427 P.2d 758, 3 CLB 429.

§76.40. Revocation of probation – Power to revoke probation after expiration of term

California When a defendant requests adjournment of a probation revocation hearing beyond the expiration date of his probation, he is estopped to object to the court's jurisdiction to revoke probation after such expiration. In re Griffin, 431 P.2d 625, 3 CLB 656.

§76.55. Revocation of parole – Jurisdiction

Court of Appeals, District of Columbia U. S. Parole Board has jurisdiction to enter a parole revocation order subsequent to the expiration of parolee's sentence so long as parole violation warrant is issued prior thereto. Court leaves open question whether warrant must also be executed prior to sentence expiration date. Carswell v. Parker, 385 F.2d 645, 3 CLB 488-89.

Court of Appeals, 5th Cir. Federal parole officials were not deprived of jurisdiction

over defendant who was convicted of a territorial offense in Alaska prior to statehood, was confined in a federal penitentiary, and was given a mandatory conditional release after statehood was granted. Hutson v. Ziegler, 362 F.2d 200, 2 CLB No. 6, p. 38.

§76.60. Revocation of parole – Grounds

Court of Appeals, 9th Cir. Probation may be revoked even though the defendant has engaged in no misconduct during the period of probation; district court may consider acts committed before probation was granted but not known to it at the time of such granting, and may also consider the defendant's efforts to conceal these earlier acts [following *Burns* v. *United States,* 287 U.S. 216 (1932) and *Kirsch* v. *United States,* 173 F.2d 652 (8th Cir. 1949)]. Longknife v. United States, 381 F.2d 17, 3 CLB 489.

§76.70. Revocation of parole – Scope of hearing

Court of Appeals, District of Columbia District of Columbia Circuit refuses to decide whether a parolee convicted of a crime is entitled to a hearing to determine whether his old and new sentences should run concurrently. The Boards of Parole of the United States and of the District of Columbia have issued new regulations affording federal parolees in both state and federal prisons the right to make formal applications for such relief, and the cases are therefore remanded for further administrative action. The Parole Board Cases (Shelton v. United States Board of Parole), 388 F.2d 567, 3 CLB 640.

§76.95. Revocation of parole – Credit for time served on parole prior to revocation

Court of Appeals, 10th Cir. Where defendant is paroled under mandatory release statute, he is not entitled to sentence credit for time served on parole prior to revocation even though release was "mandatory" and conditions of release were "numerous and onerous." Weathers v. Willingham, 356 F.2d 421, 2 CLB No. 3, p. 51.

§77.10. Revocation of pardon – Delay in effecting return of defendant

Court of Appeals, 5th Cir. Twenty-eight year failure of state authorities to take any steps to have "furloughed" prisoner complete his sentence deprive them of jurisdiction. Shields v. Beto, 370 F.2d 1003, 3 CLB 88, 98.

Texas Imprisonment of state convict in 1964 under 1931 Texas judgment of conviction based upon 1947 revocation of conditional pardon did not deprive the defendant of due process – even though Texas took no steps to have defendant returned until ten years after revoking pardon. Ex parte Clifton, 415 S.W.2d 661, 3 CLB 505.

§80.00. Assault

New Mexico "Appellant argues that, even if his actions amounted to a technical battery, 'the courts should not scrutinize too nicely every family disturbance.' There is no language in our statute, and we find no court decision, indicating that different standards should be employed when the victim of a battery is the spouse of the defendant." Conviction for battery upon wife affirmed. State v. Seal, 415 P.2d 845, 2 CLB No. 8, p. 41.

North Carolina The defendant's picking up a four year old female child, holding her in his arms and then putting her down upon request by her guardian does not constitute an assault, absent any evidence of threatened violence or fright as a result of the defendant's action. The court noted that the defendant "may have had the natural instinct that many normal men have to affectionately hold a child." State v. Roberts, 155 S.E.2d 303, 3 CLB 570.

§80.05. Attempts

Wisconsin Where defendant is dissuaded from raping complainant because she reveals her pregnancy to him, he is not relieved of responsibility for attempted rape. Le Barron v. State, 145 N.W.2d 79, 2 CLB No. 10, p. 46.

§80.10. Barratry

Arizona Defendant was properly con-

victed of unauthorized practice of law for representing a *habeas corpus* prisoner who had asked for a lawyer and had been denied same. Hackin v. State, 427 P.2d 910, 3 CLB 496.

§80.15. Bigamy

New York Where defendant pleaded guilty to bigamy charge predicated upon his marriage to Marcia while being married to Miriam, *coram nobis* hearing would be granted to determine whether marriage to Miriam was invalid because defendant alleged there was a prior subsisting marriage to Jeanne at the time of marriage to Miriam; if second marriage was invalid, bigamy charge could not be based thereon. People v. Goodwyn, 26 A.D.2d 586, 2 CLB No. 8, p. 41.

§80.20. Bribery

Court of Appeals, 5th Cir. Insurance salesman's payment to Air Force sergeant for names of all recruits, contrary to Air Force regulations, held a violation of Federal Bribery Statute as payment made "to induce [government official] to do an act in violation of his lawful duty." Parks v. United States, 355 F.2d 167, 2 CLB No. 1, p. 44.

§80.22. Burglary

Illinois Outdoor telephone booth held a "building" within meaning of Illinois burglary statute. People v. Goins, 213 N.E.2d 52, 2 CLB No. 2, p. 53.

§80.23. Conspiracy

Court of Appeals, 6th Cir. One who is incapable of committing the criminal act himself, but who knowingly causes another to innocently commit it, can be guilty of conspiring to violate laws of United States. Lester and Buccieri v. U.S., 363 F.2d 68, 2 CLB No. 8, p. 31.

Maine Where the defendant was charged with conspiring to injure property together with two alleged co-conspirators, and the latter secured directed verdicts of acquittal when their confessions were excluded, the defendant's conviction was reversed. ". . . [W]here all but one of the charged conspirators are acquitted, the verdict against one cannot stand; otherwise it would result in a repugnancy upon the record." State v. Breau, 222 A.2d 774, 2 CLB No. 10, p. 51.

§80.25. Dangerous and deadly weapons

Kentucky A pocket knife with a three inch blade is a deadly weapon as a matter of law in armed robbery conviction. Mason v. Commonwealth, 396 S.W.2d 797, 2 CLB No. 2, p. 60.

Oregon A beer bottle when used as a club may be a dangerous weapon within the meaning of the statute defining an assault with a dangerous weapon. The prosecution need not establish that it is a dangerous weapon by means of expert testimony. State v. Anderson, 411 P.2d 259, 2 CLB No. 4, p. 59.

Wisconsin A pellet gun is a "dangerous weapon" within meaning of armed robbery statute, W.S.A. 939.22 (10, 14), 943.32 (1, 2). Rafferty v. State, 138 N.W.2d 741, 2 CLB No. 2, p. 60.

§80.28. Endangering morals of minor

New York Uttering obscenities at a minor held punishable under N.Y. Penal Law Sec. 483(2) (endangering morals of minor). People v. Rice, 17 N.Y.2d 881, 2 CLB No. 6, p. 50.

§80.30. Felony murder

California Felony murder conviction reversed where escaping accomplice is killed by police. Other errors held harmless. People v. Gilbert and King, 408 P.2d 365, 2 CLB No. 1, p. 54.

Colorado Where the defendant, while escaping in an automobile from the scene of a robbery, collides with another vehicle, killing the driver thereof, he may be convicted of felony murder; the escape is in furtherance of the underlying robbery. Whitman v. People, 420 P.2d 416, 3 CLB No. 1, p. 53.

Oregon Trial court erroneously gave felony murder charge where the underlying felony was the assault upon the victim which resulted in death. Assault merged in the homicide. Collins v. Lantz, 415 P.2d 763, 2 CLB No. 8, p. 48.

§80.40. Forgery

Colorado In a prosecution for forging the indorsement of a payee on a check, it need not be proved directly that the defendant lacked the payee's permission to sign for him; proof that the defendant represented himself as the true payee and gave a non-existent address is sufficient circumstantial evidence of such lack of authority. Avila v. People, 431 P.2d 782, 3 CLB 654.

Florida Forgery conviction was reversed where the only proof tending to establish the fictitious character of the maker was the testimony of the state's investigator that he could not locate the maker. Maura v. State 181 So.2d 231, 2 CLB No. 2, p. 48.

Illinois It was unnecessary, to sustain forgery prosecution, that the forged check if genuine, would have imposed liability upon the maker. Check marked "void after thirty days," which was cashed after thirty day period could nonetheless be the subject of a forgery prosecution. People v. Marks, 211 N.E.2d 548, 2 CLB No. 1, p. 56.

§80.50. Gambling offenses

United States Supreme Court Where government intends to prove that the 75 New Hampshire sweepstake acknowledgments which the defendant transported from New Hampshire to New York were being delivered to non-New Hampshire residents as receipts of sweepstake tickets purchased for them, the acknowledgments constitute "records, papers, and writings . . . to be used" in the sweepstakes within the meanings of 18 U.S.C. 1953(a) ["Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in . . . wagering pools with respect to a sporting event . . . shall be fined . . . or imprisoned"]. United States v. Fabrizio, 385 U.S. 263, 3 CLB 37.

Massachusetts Wagered money held not to be an "apparatus" or "device" for registering bets within the meaning of Massachusetts statute (G.L. c.271, §17) making it unlawful to be present at a place where an apparatus or device for registering bets is located. Commonwealth v. Demogenes, 211 N.E.2d 226, 2 CLB No. 1, p. 64.

§80.60. Homicides – in general

Pennsylvania "In this case, the stabbing necessitated the operation; the operation was the direct cause of the stomach complication and abdominal distension; and the insertion of the tubes was required to alleviate this condition and to save the victim's life. The fact that the victim, while in a weakened physical condition and disoriented mental state, pulled out the tubes and created the immediate situation, which resulted in his death, is not such an intervening and independent act sufficient to break the chain of causation or events between the stabbing and the death." Commonwealth v. Cheeks, 223 A.2d 291, 3 CLB 55.

§80.75. Larceny

Florida Where the defendant was the coowner of a joint bank account and where no other party had a special interest sufficient to defeat his interest therein, his withdrawal of the funds did not constitute a larceny. Escobar v. State, 181 So.2d 193, 2 CLB No. 2, p. 53.

Texas Defendant's momentary possession of money for allegedly fraudulent extermination requested by police officer was not an appropriation to his own use. Johnson v. State, 397 S.W.2d 857, 2 CLB No. 3, p. 61.

Wisconsin Contractor can be convicted of theft where he uses funds paid to him by purchaser of building to cover lienable claims for payment of pre-existing debt arising out of construction of different building. Contractor is trustee of such funds and they cannot be converted to uses other than those contemplated in contract. State v. Halverson, 145 N.W.2d 739, 3 CLB 71.

§80.90. Manslaughter

Kansas Element of malice necessary to sustain finding of first degree manslaugh-

ter by automobile under Kansas statute may not be implied from mere act of driving while under influence of intoxicating liquor. State v. Jensen, 417 P.2d 273, 2 CLB No. 9, p. 51.

§80.95. Murder

Arizona Homicide committed in the operation of a motor vehicle may give rise to murder conviction, but malice aforethought, express or implied, must be established. Grossly negligent conduct is not sufficient to imply the element of malice. Nor is such negligence sufficient to establish "an abandoned and malignant heart" within the contemplation of the murder statute. State v. Chalmers, 411 P.2d 448, 2 CLB No. 4, p. 54.

§81.10. Obscenity

United States Supreme Court Applying a collective test based upon the individual views of a majority of the justices, the Supreme Court in a *per curiam* decision holds a number of sex paperback books and "cheese cake" magazines to be constitutionally protected. Redrup v. New York, 386 U.S. 767, 3 CLB 314.

California "Without the requirement that the defendant be shown to have prepared the material *with intent to distribute it in its obscene form,* the statute would apply to matter produced solely for the personal enjoyment of the creator or as a means for the improvement of his artistic technique. Such a statute would approach an interdiction of individual expression in violation of the First and Fourteenth Amendments." (emphasis supplied) In re Klor, 415 P.2d 791, 2 CLB No. 8, p. 52.

Maryland Statutory requirement of *scienter* as expressed by phrase "knowingly . . . sell any lewd, obscene, or indecent . . . photograph," does not mean that a seller cannot be charged with the requisite knowledge until a court adjudicates a particular photograph as being obscene or lewd. Levin v. State, 228 A.2d 487, 3 CLB 428.

Massachusetts The Supreme Judicial Court of Massachusetts holds that the book "Naked Lunch" is not obscene unless it is proved that the book is being distributed in a manner "to exploit it for the sake of its possible prurient appeal." Attorney General v. A Book Named "Naked Lunch," 218 N.E.2d 571, 2 CLB No. 8, p. 52.

§81.20. Perjury

Court of Appeals, 2nd Cir. Perjurious statements given to grand jury do not cease to be material because underlying charges are dismissed at trial. United States v. McFarland, 371 F.2d 701, 3 CLB 14, 28.

Court of Appeals, 5th Cir. Failure of government to offer evidence that defendant, on trial for perjury, had taken an oath, constitutes a failure of proof on an essential element of the crime. Smith v. U.S., 363 F.2d 143, 2 CLB No. 8, p. 34.

Court of Appeals, 6th Cir. Witness cannot be convicted of perjury where answer is "literally accurate, technically responsive, or legally truthful." United States v. Wall, 371 F.2d 398, 3 CLB 88, 98.

North Carolina Requirement of either a second witness or "corroborating circumstances" in subornation of perjury prosecution held not satisfied by testimony of three police officers that alleged suborned witness (who has already testified to subornation) told them about it. State v. King, 148 S.E.2d 647, 2 CLB No. 7, p. 49.

§81.30. Prostitution

Missouri Defendant received money "without consideration" from woman engaged in prostitution. State v. Harris, 396 S.W.2d 585, 2 CLB No. 2, p. 54.

§81.40. Seduction

Kentucky A divorced woman can be the victim of the crime of seduction; court rejects argument that "once a woman has been married she can no longer be considered a chaste person, and that by reason of her marriage she has become so knowledgeable that she is immune to the wiles of a seducer." Amburgey v. Commonwealth, 415 S.W.2d 103, [illegible] CLB 512.

§81.45. Sodomy
New Jersey Emission is not an essential element of sodomy. State v. Taylor, 217 A.2d 1, 2 CLB No. 4, p. 52.

§81.50. Sunday closing law
South Carolina Where Army's Sunday morning order for 1000 cases of 3.2 beer was an "emergency" order conditioned upon immediate delivery at military base, sale did not occur until actual delivery, and defendant supplier could therefore not be convicted of violating state statute prohibiting sale of beer in South Carolina on Sunday. South Carolina Tax Commission v. Schafer Distributing Co., 148 S.E. 2d 156, 2 CLB No. 6, p. 54.

§81.55. Traffic violations
Illinois Appellate Court of Illinois holds that prosecution under ordinance for traffic violation is a civil matter, governed by rules of civil procedure, and burden of proof is on city to establish violation by clear preponderance of the evidence. City of Highland Park v. Curtis, 226 N.E. 2d 870, 3 CLB 497.

§81.60. Unlawful entry
Court of Appeals, District of Columbia "Appellants appear to argue that the jury should have been instructed that the President is the 'lawful occupant' of the White House and that only he could demand that appellants leave. This argument ignores the fact that the White House is more than the dwelling of the President. It is also an office building and portions of it have a 'museum character.' It was into the museum portion that appellants were admitted as tourists. Major Stover, in command of the White House Police and responsible for the security of the White House, was the logical person in charge to order unauthorized visitors to leave this government building."

Unlawful entry convictions of White House "sit-ins" affirmed. Whittlesey v. United States, 221 A.2d 86, 2 CLB No. 8, p. 56.

§83.00. False statement (18 U.S.C. 1001)
Court of Appeals, 2nd Cir. Second Circuit holds an investigation is a matter over which the F.B.I. has "jurisdiction" and therefore a person who gives false information to the F.B.I. which caused them to make an investigation may be convicted under 18 U.S.C. 1001. United States v. Adler, 380 F.2d 917, 3 CLB 485.

§83.05. Federal anti-gambling statute
Court of Appeals, 4th Cir. Defendant's transportation of a mobile home from one state to another for the purpose of establishing new residence in the vicinity of a gambling establishment which he was going to operate was not the type of travel that could be considered so intimately connected with the furtherance of the illegal gambling enterprise as to come within the meaning of Federal anti-gambling statute. United States v. Hawthorne, 356 F.2d 740, 2 CLB No. 3, p. 46.

§83.10. Hobbs Act violation
Court of Appeals, 7th Cir. Extortion of money by threat to withhold building permit for proposed manufacturing plant constitutes a violation of the Hobbs Act (making it a federal crime to "in any way or degree obstruct, delay, or affect commerce or the movement of any article or commodity in commerce, by extortion . . .") where withholding of permit would have delayed shipment into state of building materials for plant and raw materials for product, and shipment out of state of finished goods. United States v. Pranno, 385 F.2d 387, 3 CLB 637.

§83.20. Interstate theft
United States Supreme Court Truck driver who embezzles funds of his employer, a single proprietor engaged in interstate commerce, is guilty of violating 18 U.S.C. 660 (prohibiting theft from a "firm, association or corporation) U.S. v. Cook, 384 U.S. 257, 2 CLB No. 6, p. 3.

§83.25. Interstate transportation of forged securities
Court of Appeals, 6th Cir. Sixth Circuit holds that interstate transportation of forged gasoline credit sales invoices does

not . constitute an offense against the United States (adopting Fifth Circuit position in Merrill v. U.S., 338 F.2d 763 (1964)). Sales invoice is not a security within the contemplation of 18 U.S.C. 2314 (prohibiting transportation of forged securities in interstate commerce). Court further holds that collateral attack on indictment via 28 U.S.C. §2255 lies to vacate judgment. Beam v. U.S., 364 F.2d 756, 2 CLB No. 8, p. 34.

§83.30. Interstate transportation of "goods"

Court of Appeals, 2nd Cir. Photocopies of secret formula constitute "goods" within the meaning of the federal act prohibiting interstate transportation of "goods" stolen, converted or taken by fraud. U.S. v. Bottone et al., 365 F.2d 389, 2 CLB No. 8, p. 32.

§83.40. Mail fraud

Court of Appeals, 5th Cir. Defendant entitled to acquittal where mails were used after fraudulent scheme was fully executed and communication was not designed to lull victims into inaction. Gordon v. United States, 358 F.2d 112, 2 CLB No. 4, p. 37.

§83.50. Misprision of a felony

Court of Appeals, 9th Cir. The fact that the government knew of both the existence of the crime and the identity of perpetrator did not prevent defendant from being convicted of misprision of a felony. Lancey v. United States, 356 F.2d 401, 2 CLB No. 3, p. 50.

§83.70. Registration of narcotics violators

Court of Appeals, 7th Cir. Failure of U.S. customs officials to inform defendant of his duty to register as a prior narcotics felon upon re-entering the country as required by 18 U.S.C. 1407 and to supply him with the requisite registration form pursuant to 19 C.F.R. §23.9a required a reversal of his conviction. See *United States* v. *Jones*, 368 F.2d 795 (2d Cir. 1966). United States v. Sansone, 385 F.2d 247, 3 CLB 640.

§83.80. Selective service violations

Court of Appeals, 7th Cir. Applicant for ministerial exemption has burden of establishing to draft board that his removal "would leave a flock . . . without a shepherd." United States v. Petiach, 357 F.2d 171, 2 CLB No. 3, p. 54.

Court of Appeals, 9th Cir. A reclassification of II-S student eight days after he had notified draft board that he had intentionally destroyed his draft card and would refuse to carry another one was not a violation of his First Amendment rights. Wills v. United States, 384 F.2d 943, 3 CLB 642.

Court of Appeals, 10th Cir. Delinquent reservist certified for priority induction into armed forces as a result of unsatisfactory performance of reserve duties has the right to make conscientious objector claim with local board pursuant to 50 U.S.C. App. 456(j) in connection with induction proceedings. Quaid v. United States, 386 F.2d 25, 3 CLB 636.

§83.85. Threats through the mail

Court of Appeals, 9th Cir. Fact that defendant, a Federal prisoner, had no access to a U.S. mail box and left his letters on a ledge outside of his cell was no defense to a prosecution of sending threatening letters to sentencing judge. Testimony that he never thought letters would get past censors merely created an issue of fact as to his intent. Kendrick v. United States, 367 F.2d 632, 2 CLB No. 10, pp. 24-44.

§85.00. Contempt — Civil and Criminal contempt distinguished

United States Supreme Court Where appellant's contempt conviction and two year prison sentence provided that he would be unconditionally released if he testified before the Grand Jury (he had been granted immunity) the conviction was upheld as a civil contempt. Shillitani v. U.S., Pappadio v. U.S., 384 U.S. 364, 2 CLB No. 6, p. 24.

§85.10. Contempt — Grounds

United States Supreme Court Witness'

refusal to answer questions before congressional subcommittee held not a contempt of Congress where neither the subject matter of the inquiry nor the committee's authority to investigate appeared explicitly in the record. Gojack v. U.S., 384 U.S. 702, 2 CLB No. 6, p. 23.

Missouri The fact that appellant offered friend a sum of money to bribe a juror will not sustain a conviction for contempt of court. Ex parte Miles, 406 S.W.2d 107, 2 CLB No. 10, p. 56.

New York New York Court of Appeals affirms contempt convictions of defendants who, after being granted immunity, refused to testify before Grand Jury. Court finds that the defendants were afforded procedural due process and that the testimony sought was relevant to the inquiry. Matter of Koota v. Colombo et al., 17 N.Y.2d 147, 2 CLB No. 4, p. 47.

§85.20. Contempt – Formal requirements

Illinois Judgment of direct criminal contempt of court, allegedly committed by "contemptuous" or "improper" conduct before the grand jury, was reversed where judgment order did not set forth the findings of fact upon which the contempt conviction was based. People v. Morris, 212 N.E.2d 101, 2 CLB No. 1, p. 51.

§85.30. Contempt – Right to jury trial

United States Supreme Court Conviction for criminal contempt affirmed. Trial by jury not required where sentence does not exceed six months. Cheff v. Schnackenberg, 384 U.S. 373, 2 CLB No. 6, p. 23.

Court of Appeals, 10th Cir. Defendant was not entitled to a jury trial in contempt proceeding where sentence was suspended and the defendant placed on probation. Test is whether contempt sentence is in excess of the maximum provided for a petty offense. *Cheff* v. *Schnackenberg*, 384 U.S. 373, and because a defendant may receive up to five years probation for a petty offense, instant sentence was within permissible limits. Frank v. United States, 384 F.2d 276, 3 CLB 637.

§85.35. Contempt – Defenses

United States Supreme Court Petitioner may not be held in contempt for refusing to testify before a grand jury where he had withdrawn his previous waiver of immunity and where the state had either not conferred immunity upon him or had not told petitioner that it had conferred an immunity coextensive with the privilege. Stevens v. Marks, 383 U.S. 234, 2 CLB No. 4, p. 31.

Court of Appeals, 2nd Cir. Contempt conviction of recalcitrant trial witness reversed where he could "reasonably have sensed the peril of prosecution." United States v. Chandler, 380 F.2d 993, 3 CLB 397, 409.

West Virginia West Virginia Court reverses contempt of Jehovah's Witness who refused to serve on Grand Jury because of his personal religious convictions. State v. Everly, 146 S.E.2d 705, 2 CLB No. 4, p. 46.

§85.40. Contempt – Punishment

Court of Appeals, 2nd Cir. Three repeated sentences for three successive contumacious refusals to answer same question before grand jury held not a violation of due process. United States ex rel. Ushkowitz et al. v. McCloskey, 359 F.2d 788, 2 CLB No. 5, p. 34.

§86.20. Extradition proceedings – Requirements

Court of Appeals, District of Columbia Demanding state in extradition proceeding must establish probable cause under Fourth Amendment standards. Affidavit merely reciting words of a statutory violation without stating facts showing probable cause was insufficient to extradite fugitives. Kirkland v. Preston, 385 F.2d 670, 3 CLB 555.

Minnesota Where accused offers positive and unequivocal testimony that he was not present in demanding state at time of alleged crime, state must offer testimony, subject to cross-examination, establishing that he was present in demanding state. State v. Limberg, 142 N.W.2d 563, 2 CLB No. 6, p. 46.

§86.30. Extradition proceedings — Scope of hearing

Idaho Petitioner's claim that demanding state's probation had not been terminated was not properly before court in extradition proceedings. Richardson v. State, 414 P.2d 871, 2 CLB No. 7, p. 47.

Illinois Supreme Court of Illinois reaffirms its adherence to rule that court, in habeas corpus proceeding challenging extradition, will not hear evidence relating to the prospective abuse of prisoner's civil rights if returned to demanding jurisdiction. People ex rel. Hogan v. Oglivie, 219 N.E.2d 491, 2 CLB No. 9, p. 48.

§87.10. False arrest suits — Grounds

Washington Arrest of a diabetic in insulin shock upon reasonable belief that he was intoxicated was lawful, but an action for false imprisonment lies for his continued detention after such time as the police should have known his true condition. Tufte v. City of Tacoma, 431 P.2d 183, 3 CLB 648.

§87.20. False arrest suits — Defenses

Iowa Sheriff who did not release prisoner because he had no knowledge that Grand Jury had failed to indict is not liable to suit for false imprisonment. Johannsen v. Stevart, 152 N.W.2d 202, 3 CLB 579.

Washington Where prosecuting attorney, acting in his capacity as quasi-judicial officer, has immunity from tort liability, the county and state also have immunity in tort action based upon his acts. Creelman v. Svenning, 410 P.2d 606, 2 CLB No. 3, p. 62.

§88.00. Forfeiture proceedings — in general

Court of Appeals, 5th Cir. Government is not entitled to forfeiture of weapon which Lee Harvey Oswald is believed to have used to assassinate President Kennedy, on theory that by ordering weapon under false name he "caused" dealer to make an illegal false record-keeping entry. King v. U.S., 364 F.2d 235, 2 CLB No. 8, p. 33.

Court of Appeals, 8th Cir. Trial court improperly entered judgment n.o.v. in civil forfeiture proceeding of pick-up truck allegedly used to transport untaxed alcohol where jury found for claimant even though uncontradicted testimony of three government witnesses was that liquid which had been on truck was alcohol. Compton v. United States, 377 F.2d 408, 3 CLB 327.

§89.10. Juvenile proceedings — Right to counsel

Arizona The right to counsel in a juvenile court (*In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527) may clearly be asserted collaterally, regardless of the date of adjudication. Application of Billie, 429 P.2d 699, 3 CLB 581-82.

§89.15. Juvenile proceedings — Right to counsel — At waiver hearing

United States Supreme Court Juvenile defendant entitled to hearing and effective assistance of counsel on "critically important" waiver of Juvenile Court jurisdiction. Kent v. United States, 383 U.S. 541, 2 CLB No. 4, p. 29.

New Mexico Indigent defendant has no right to appointed counsel at a juvenile court proceeding to determine whether he is fit for juvenile treatment or should be prosecuted criminally. State v. Acuna, 428 P.2d 658, 3 CLB 506.

Virginia Failure to provide counsel or advise juvenile of his right to counsel at juvenile hearing to determine whether the juvenile court should retain the case or transfer it so that the defendant could be tried as an adult is not a denial of due process of law. Cradle v. Peyton, 156 S.E. 2d 874, 3 CLB 660.

§89.40. Juvenile proceedings — Standards for determining admissibility of confession or admission by juvenile

Florida Where a conviction of a minor based upon his guilty plea is set aside because of the State's failure to notify the parents of the criminal charges, the incriminating statements of the minor which were offered at time of sentencing are inadmissible at the subsequent trial. Brooks

v. State, 173 So.2d 550, 2 CLB No. 4, p. 45.

Indiana Confession taken by prosecutor from seventeen year old boy, after arraignment, in the absence of counsel conceded to be admissible by counsel. Weaver v. State, 215 N.E.2d 533, 2 CLB No. 5, p. 45.

Missouri Missouri Supreme Court holds that where police fail to bring juvenile to Juvenile Court immediately upon arrest as required by statute, statements taken from him during subsequent detention are inadmissible. State v. Orbeiter, 408 S.W. 2d 26, 3 CLB No. 1, p. 60.

New York Where juveniles confessed to murder, the test of admissibility of their confessions in juvenile delinquency proceedings was one of voluntariness. Confessions held involuntary. In the Matter of Gregory W. and Gerald S. v. Flynn, 19 N.Y.2d 55, 3 CLB 60.

New York Finding of voluntariness affirmed even though 17 year old boy was interrogated for several hours by seven police officers and District Attorney, and saw his father denied access to him because he had not as yet confessed. People v. Hocking, 18 N.Y.2d 832, 2 CLB No. 9, p. 45.

§89.50. Juvenile proceedings — Applicability of Fourth Amendment exclusionary rule

New Jersey Fourth Amendment protection against illegal search and seizure applies to juvenile proceedings where juvenile is accused of an act which would be a crime if committed by an adult. Court stresses the concept that "the rehabilitative goal of the Juvenile Court is to instill respect for law and order. Such a goal is best realized if the police are required to deal fairly and legally with juveniles. State v. Lowry, 230 A.2d 907, 3 CLB 582.

§89.60. Juvenile proceedings — Right to assert insanity defense

Wisconsin Due process requires that the defense of insanity be recognized in juvenile delinquency proceedings. In re Winburn, 145 N.W.2d 178, 2 CLB No. 10, p. 57.

§90.00. Mandamus — In general

Ohio Mandamus lies to compel lower court to render decision on motion for post-conviction relief where petition has been pending for twelve months. State ex rel. Turpin v. Court of Common Pleas, 200 N.E.2d 670, 3 CLB No. 1, p. 63.

§90.56. Grounds for suits by prisoners under Federal Civil Rights Act — Censorship

Court of Appeals, 4th Cir. Fourth Circuit criticizes practice in Virginia state prisons of censoring inmates' mail to courts. Coleman v. Peyton, 362 F.2d 905, 2 CLB No. 7, p. 38.

§90.58. Grounds for suits by prisoners under Federal Civil Rights Act — Segregated prison facilities

Court of Appeals, 8th Cir. "To the extent that §§ 46.301-46.360 of the Arkansas statute require segregation of juveniles to white schools or colored schools, based solely upon the race of the individual involved, the statutes are clearly unconstitutional: to the extent that the statutes require commitment to (or maintenance of) segregated facilities, they are clearly unconstitutional. . . ." Board of Managers v. George et al., 377 F.2d 228, 3 CLB 330.

§90.60. Grounds for suits by prisoners under Federal Civil Rights Act — Freedom of religion

Court of Appeals, 5th Cir. Mandamus under 28 U.S.C. 1361 lies to require prison officials to allow Muslims opportunity to practice their religion under reasonable restrictions necessary in a large prison population. Walker et al. v. Blackwell, 360 F.2d 66, 2 CLB No. 5, p. 37.

§90.65 Grounds for suits by prisoners under Federal Civil Rights Act — Limitations on reading matter

Court of Appeals, 4th Cir. Action of state prison authorities in refusing to permit Negro prisoner to receive non-subversive Negro newspapers while allowing white

prisoners the right to receive "white" newspapers held a violation of equal protection. Rivers v. Royster, 360 F.2d 592, 2 CLB No. 5, p. 37.

§90.68. Grounds for suits by prisoners under Federal Civil Rights Act — Collection of court costs from prisoner's funds

United States Supreme Court New Jersey statute which mandated withholding of earnings of indigent prisoner who had unsuccessfully appealed conviction until the transcript of the trial minutes were paid for held unconstitutional. Rinaldi v. Yeager, 384 U.S. 305, 2 CLB No. 6, p. 25.

Colorado Trial courts may not order prisoners' funds withheld for payment of court costs. Williams v. District Court, 417 P.2d 496, 2 CLB No. 9, p. 50.

§90.70. Grounds for suits by prisoners under Federal Civil Rights Act — Limitations on legal assistance of fellow inmates

Court of Appeals, 6th Cir. Regulation of Tennessee State Penitentiary prohibiting any inmate from advising or assisting other prisoners in the preparation or filing of writs of habeas corpus or other legal papers neither violates the federal habeas corpus statute (authorizing the filing of petitions by someone acting on the petitioner's behalf) nor the prisoner's constitutional rights to the effective aid of habeas corpus. Johnson v. Avery, 382 F.2d 353, 3 CLB 559.

§91.00. Youthful offender proceedings — in general

New York Where defendant was approved for adjudication as a youthful offender his subsequent conviction for another offense could not serve as a basis for rescinding youthful offender status. People v. Butts, 18 N.Y.2d 614, 2 CLB No. 8, p. 57.

§92.10. Assigned counsel's right to compensation — In general

Illinois Attorney who is assigned by court to case which requires him to leave his home and practice for protracted length of time is constitutionally entitled to reasonable fee and reimbursement for expenses. People ex rel. Conn v. Randolph, 219 N.E.2d 337, 2 CLB No. 9, p. 41.

Kansas Assigned counsel in habeas corpus proceeding entitled to compensation under applicable Kansas statute. Stahl v. Board, 426 P.2d 134, 3 CLB 342.

Montana Montana court has neither constitutional nor statutory power to assign and provide compensation for counsel to indigent defendant charged with misdemeanor. State v. Dist. Court of Eighteenth Judicial Dist., 410 P.2d 933, 2 CLB No. 4, p. 54.

Wisconsin Assigned counsel entitled to reasonable value of legal services. State bar minimum fee is to be discounted because of assurance of payment from county treasury. State v. Dekeyser, 138 N.W.2d 129, 2 CLB No. 3, p. 55.

§92.15. Assigned counsel's right to compensation — Federal Criminal Justice Act

Attorney assigned to represent indigent defendant in federal probation revocation proceeding entitled to compensation under Federal Criminal Justice Act. United States v. Boyden, 248 F. Supp. 291, 2 CLB No. 1, p. 34.

§92.40. Freedom of the press

Court of Appeals, District of Columbia Preliminary injunction preventing editor of Joe Valachi's memoirs from disseminating or publishing them in any way affirmed on appeal. Court suggests that trial of case be expedited. Maas v. United States, 371 F.2d 348, 3 CLB 41.

North Dakota Newspaper reporters have the right to inspect non-confidential records of criminal court, subject, however, to reasonable rules fixing time, place and manner of inspection. State v. O'Connell, 151 N.W.2d 758, 3 CLB 575.

§92.50. Legal ethics

Connecticut Trial judge's publication of article about case in national magazine during pendency of appeal held to be

"improper and in poor judgment" but neither violative of the defendant's rights to a fair trial nor prejudicial to his rights on the appeal. Argument that article might cause any member of the appellate court to form an opinion of the facts and the law prior to presentation of the appeal characterized as "far fetched." State v. Smith, 220 A.2d 44, 2 CLB No. 7, p. 42.

§92.60. Use of informants

Court of Appeals, 6th Cir. Government's contingent fee arrangement with informant not based on apprehension of a specific suspect upheld. United States v. Costner, 359 F.2d 969, 2 CLB No. 6, p. 37.

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